CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED SEPTEMBER 22, 1906.

(20,367.)

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No. 1240.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Transcript of Record.

Error to the Circuit Court of the United States for the District of Montana.

1 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Caption.

Be it remembered that on the twenty-sixth day of June, 1899, the plaintiff herein filed its second amended and supplemental complaint, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, Defendant.

Second Amended and Supplemental Complaint.

Now comes the plaintiff in the above-entitled action, and for
2 a second amended and supplemental complaint, by leave of the Court first had and obtained, complains of the defendant herein, and for cause of action alleges:

I.

That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then territory (now State) of Montana, under the corporate name of St. Louis Mining and Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said de-

fendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and, as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State.

II.

That at the times hereinafter mentioned this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz Lode Mining Claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis Lode Mining Claim, al-
3 though such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis Quartz Lode Mining Claim, which is situated in Ottawa Mining District, in the county of Lewis and Clark, and State of Montana, and more particularly described as follows, to wit:

Beginning, for the description of lots Nos. 54 and 55 A at corner No. 1, a granite stone 16 by 12 by 12 inches marked "1 M. C. 54," a mound of stones alongside, from which the quarter-section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian bears south 74 degrees and 15 minutes east, 353 feet distant.

Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet, intersect line between townships 11 and 12 north of range 6 west, a granite stone 15 by 14 by 12 inches, marked "54 M. C. 55 A," 450 feet to a point from which a shaft bears north 67 degrees, west 285 feet distant, and from said shaft an open cut, 3 by 5 feet, 100 feet long, runs south 54 degrees east; 655 feet to a point from which a shaft bears west 153 feet distant, 1097 feet to corner No. 2, a slate stone 20x12x5 inches, marked "2 M. C. 55 A," a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner No. 3, a slate stone 14 by 10 by 4 inches, marked "3 M. C. 55 A," a mound of stones
4 alongside, from which the southeast location corner bears south 10 degrees east 435 feet distant.

Thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 by 9 by 7 inches, marked "4 M. C. 55 A," a mound of stones alongside, from which the southwest location corner bears south 79 degrees west 182 feet distant.

Thence fourth course, magnetic variation 18 degrees east, north 51 degrees 15 minutes east, 425 feet to corner No. 5, a granite stone

16 by 12 by 6 inches, marked "5 M. C. 55 A," a mound of stones alongside.

Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees 45 minutes east, 529 7-10 feet distant, intersect said township line, a granite stone 18 by 16 by 7 inches, marked "54 A. 54 M. C.," 1069 feet to corner No. 6, a granite stone 18 by 12 by 6 inches, marked "6 M. C. 54 A," from which a fir tree 13 inches in diameter, marked "6 M. C. 54 B. T.," bears north 15 degrees east 24 feet distant, and a pine tree 5 inches in diameter, marked "C. M. C. 54 B. T.," bears south 54 degrees east, 21 5-10 feet distant.

Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east 515 5-10 feet to corner No. 1 of lot No. 40, the Drumlummon Lode Claim, 579 feet to corner No. 1, the place of beginning, said lots Nos. 54 and 55 A extending 1500 feet in length along said St. Louis vein or lode, the granted premises in said lot containing 18 acres and ninety-three hundredths of an acre.

5 Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode Mining Claim, which said fractional portion of said St. Louis Lode Mining Claim is described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis lode claim, between corners two and three thereof, 226 feet to a point on the boundary line of the St. Louis lode, between corners one and two; thence south 20 degrees 28 minutes west along said boundary, between corners one and two, 60 5-10 feet to corner No. 2 of the St. Louis lode; thence south 51 degrees 30 minutes west 403 feet to corner No. 3 of said St. Louis lode; thence north 45 degrees 30 minutes west along the line of boundary of the said St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844 50-100 square feet, together with all mineral contained therein.

III.

6 That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode Mining Claim, situate and being east of the said St. Louis Lode Mining Claim, and including the 30 foot strip or compromise ground aforesaid, and that the discovery, location and recordation of the said St. Louis Lode Mining Claim and the United States patent therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour Lode Mining Claim.

IV.

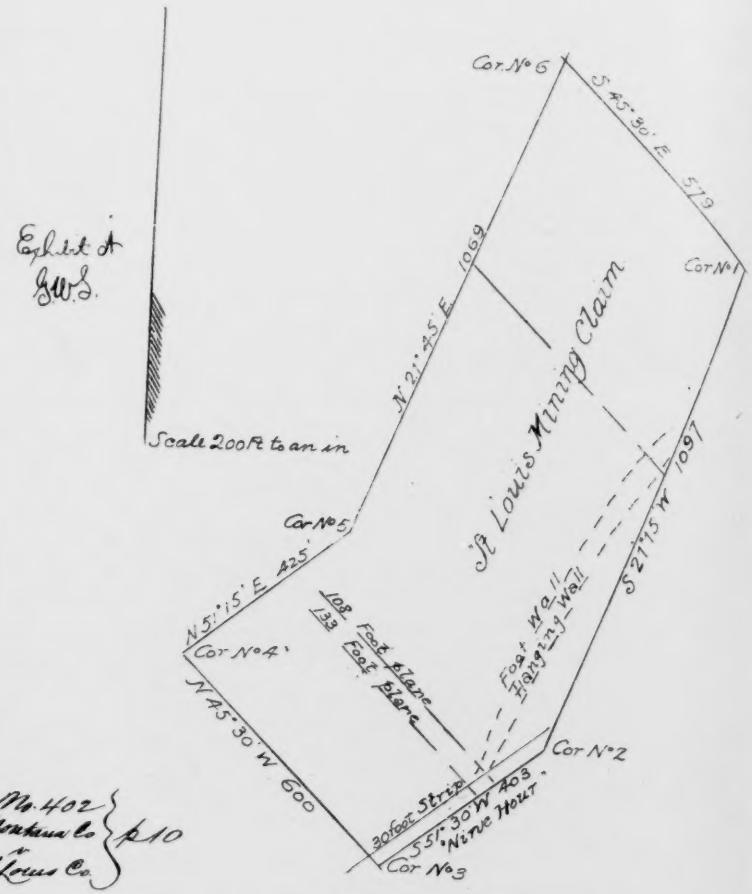
That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis Mining Claim is to the east and dips under and beneath the said Nine Hour Lode Mining Claim, including the said thirty-foot strip or the compromise ground, which is a part and portion of the said Nine Hour Quartz Lode Mining Claim, which said portion of said vein has its top or apex within the said St. Louis Mining Claim as follows, to wit: Commencing at a projected parallel and line of said St. Louis Quartz Lode Mining Claim, at a point on the east line thereof, between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging-wall of said vein, lode, or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz Lode Mining Claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging-wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of said St. Louis Quartz Lode Mining Claim; thence, from where the said projected
7 parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512 7-10 feet to a point, being the intersection of the said east side line of said St. Louis Quartz Lode Mining Claim, between corners Nos. 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 59 degrees 50 minutes west 106 feet and along the west line of the said thirty-foot strip, to a projected parallel end line of said St. Louis Quartz Lode Mining Claim, extended vertically downward, which passes through the hanging-wall of said vein at the surface and at the crossing of the said hanging-wall with the west line of the said thirty-foot strip.

That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot-wall of the said vein passes out of the east side line of the said St. Louis Lode Mining Claim.

A map or plat showing the point at which the said vein enters said St. Louis Lode Mining Claim as so hereinbefore described, and whereat the same departs therefrom upon the east line of said claim is hereto attached, marked Exhibit "A," and made a part of this complaint, and to which reference is made.

V.

That notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the thirtieth day of June,
8 1893, knowingly, wrongfully and unlawfully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis Mining Claim, and commenced extracting quartz, rock and ore therefrom, and removing the same, and converting it to its own use and benefit, and are now still removing and convert-



No. 402
Montana Co
St Louis Co.
} $10

ing the same, which said quartz, rock and ore is of the value of two hundred thousand dollars; on account thereof this plainaiff has been damaged in said sum.

That since the filing of the original complaint herein, and up to the twenty-sixth day of June, 1899, said defendant, Montana Mining Company, Limited, has extracted a large quantity of quartz, rock and ore from the premises and veins above described and within the planes aforesaid, and converted the same and the minerals therein contained to their own use, of the value of four hundred thousand dollars, and to the damage of this plaintiff in said sum.

Wherefore, plaintiff prays judgment for the said sum of six hundred thousand dollars, together with its costs and disbursements in this behalf expended.

TOOLE, BACH & TOOLE,
Attorneys for Plaintiff.

9 UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, ss:

On this twenty-fourth day of June, A. D. 1899, personally appeared before me, Harry Harris, a notary public in and for the said county and State, William Mayger, general manager and superintendent of the St. Louis Mining and Milling Company of Montana, the plaintiff corporation above named, who being by me duly sworn, deposes and says: That he is the general manager and superintendent of said company and familiar with its business; that he has read the foregoing bill of complaint, and knows the contents thereof; and that the same is true to the best of his knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-fourth day of June, A. D. 1899.

HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, State of Montana.

[Endorsed:] No. 291. (Title of Court and Cause.) Second Amended and Supplemental Complaint. Filed and entered June 26, 1899. Geo. W. Sproule, Clerk.

(Here follows diagram marked p. 10.)

11 The summons in this cause as heretofore issued being in the words and figures as follows, to-wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,

vs.

MONTANA MINING COMPANY (LIMITED), RAWLINSON T. BAYLISS, ALEXANDER BURRELL, NICHOLAS FRANCIS, ISAAC WARREN, JOSEPH HARVEY, JOHN JEWELL, and THOMAS HOWKINS, Defendants.

Action brought in the said Circuit Court, and the complaint filed in the office of the Clerk of said Circuit Court, in the city of Helena, County of Lewis and Clarke.

Summons.

The President of the United States of America to Montana Milling Company (Limited), Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Thomas Howkins, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the
12 United States, Ninth Circuit, in and for the District of Montana, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Helena, and county of Lewis & Clarke, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover a judgment against you, said defendants, for the sum of two hundred thousand — damages, sustained by plaintiff from you, said defendants, for wrongfully, unlawfully and willfully, on or about the thirtieth day of June, 1893, entering upon one of the veins, lodes or ledges bearing gold, silver, lead and other precious metals, and having its top or apex within the surface location of the St. Louis Quartz Lode Mining Claim, the property of said plaintiff; and within the vertical planes thereof, and extracting therefrom and taking large quantities of ore and quartz-rock bearing gold, silver, lead and other precious metals lying within the premises of said plaintiff, and which you have converted to your own use and benefit (for a more particular description of said premises you are hereby referred to the complaint), all of which will more fully appear by reference to the complaint on file herein, a copy of which is herewith served, and for costs of suit. And if you fail to appear and plead, answer or demur, as herein required, your default will be entered, and the plaintiff will apply to the Court for the relief demanded in the complaint.

13 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of September, one thousand eight hundred and ninety-three, and of our Independence the one hundred and eighteenth.

[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE, *District of Montana:*

I hereby certify that I received the within writ on the nineteenth day of September, 1893, and personally served the same on the twentieth day of September, 1893, on the Montana Company, Limited, a corporation, by delivering to and leaving with Rawlinson T. Bayliss, agent and general manager of the said corporation, on Rawlinson T. Bayliss personally, and Alexander Burrell, Isaac Warren, Jos. Harvey, Nicholas Francis, John Jewell and Thomas Howkins, said defendants named therein, personally, at Marysville, county of Lewis & Clarke, in said District, a certified copy thereof, together with a copy of the complaint, certified to by the clerk of the United States Court.

Helena, Sept. 21, 1893.

WM. F. FURAY,
United States Marshal,
By GEO. A. LECRESSY, *Deputy.*

14 [Endorsed:] No. 291. (Title of Court and Cause.) Summons. Filed Sept. 25, 1893. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the thirtieth day of June, 1899, the answer of defendant was filed herein, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY, Plaintiff,
vs.
MONTANA MINING COMPANY (LIMITED), Defendant.

Answer to Second Amended and Supplemental Complaint.

Comes now the defendant above-named, and for its answer to the second amended and supplemental complaint of plaintiff on file herein, says:

I.

It admits the allegations contained in paragraphs numbered 1, 2 and 3 of the said second amended and supplemental complaint.

II.

It denies each and every other allegation in the said second amended supplemental complaint contained.

15 III.

And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached marked Exhibit "A," and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis Lode Mining Claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said defendant and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or

16 about the sixth day of September, A. D. 1894, commenced an action in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis & Clarke, wherein this defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the first day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged, and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute and deliver to this defendant a good and sufficient conveyance in fee-simple absolute, free from all encumbrances for the premises mentioned and described in the complaint in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order and decree the said plaintiff, on or about the first day of July, A. D. 1895, made and executed a deed to this defendant of and for the said premises and of all the mineral therein contained; and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereunto annexed, marked Exhibit "B," and made a part of this answer. And this defendant avers that in and by the said proceedings and the said deed the said plaintiff is estopped from claiming any part of the said compromise ground or thirty-foot strip aforesaid, or any mineral contained therein.

17 Wherefore, having fully answered, the defendant prays to be hence dismissed without day, and for its costs in this behalf expended.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

STATE OF MONTANA, *County of Lewis and Clarke, ss:*

Alexander Burrell, being first duly sworn, deposes and says: the above-named defendant is a corporation, and I am an officer thereof, to wit, I am its general manager; I have read the foregoing answer and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information, and belief.

ALEXANDER BURRELL.

Subscribed and sworn to before me this thirtieth day of June, A. D. 1899.

W. E. CULLEN, JR.,
Notary Public in and for the County of Lewis & Clarke, Montana.

EXHIBIT "A."

Know all men by these presents, that I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars, for the payment of which, well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

18 Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the District Court of the Third Judicial District, Lewis & Clarke county, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger, for patent, now pending in the United States landoffice at Helena, Montana.

Now, then, in consideration thereof, and in the further consideration of one dollar, to the said Charles Mayger in hand paid, by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises, and agrees to proceed at once upon his application now pending in the United States landoffice at Helena, Montana, for a patent to the St. Louis Lode Claim described therein, and situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a government patent therefor, and, when such title shall have been procured according to said application, said Charles Mayger hereby covenants, promises, and agrees, upon the demand of the said

William Robinson and James Huggins and Frank P. Sterling, or their assigns, to make, execute, and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece, or parcel of mining ground, situate
19 in Lewis & Clarke county, Montana territory, and comprising a part of two certain quartz lode mining claims, known as the St. Louis Lode Claim and the Nine Hour Lode Claim, and particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode Claim, between corners two and three, two hundred and twenty-six feet (226) to a point on the boundary line of the St. Louis lode between corners one and two; thence south 20 degrees, 28 minutes west along said boundary line, between corners one and two, 60.5 feet to corner No. 2, of St. Louis lode, 400.31 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees, 10 minutes west along the line of boundary of St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees, 28 minutes east along a parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12.844.50 square feet, together with all the mineral therein contained. And if the said Charles Mayger, his heirs or assigns, shall make, execute, and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void, otherwise to be and remain in full force and effect.

20 Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL.]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

TERRITORY OF MONTANA, *County of Lewis & Clarke, ss:*

On the seventh day of March, eighteen hundred and eighty-four, personally appeared before me, R. H. Kemp, a notary public in and for the said county of Lewis & Clarke, Territory of Montana, Charles F. Mayger, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and who duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in the certificate first above written.

[NOTARIAL SEAL.] R. H. KEMP,
Notary Public.

Filed and recorded March 8, 1884, at 3 P. M.
O. B. TOTTEN.

21 EXHIBIT "B."

Deed to St. Louis Mining and Milling Co. of Montana to Montana Mining Co., Ltd.

This indenture, made and entered into this first day of July, in the year of our Lord one thousand eight hundred and ninety-five, between the St. Louis Mining & Milling Company of Montana, an incorporation duly organized under the laws of the State of Montana, by William Mayger of the county of Lewis and Clarke and State of Montana, its duly authorized agent and attorney in fact, the party of the first part, and the Montana Mining Company, Limited, an incorporation duly organized under the laws of the Kingdom of Great Britain and Ireland, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to its assigns forever, all and singular those certain premises, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana, more particularly bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 min-
22 utes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode Claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode Claim between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of the said St. Louis Lode Claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the said boundary line of the St. Louis Lode Claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing

quartz-rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party
23 of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, with the appurtenances and privileges thereto incident, unto the said party of the second part and its assigns forever.

In witness whereof, the said William Mayger, as attorney in fact and agent as aforesaid for the said party of the first part, has hereunto subscribed its name, set his hand and seal this first day of July, A. D. 1895, as its said agent.

ST. LOUIS MINING & MILLING CO., [SEAL.]
By WILLIAM MAYGER,
Its Agent and Attorney in Fact.

STATE OF MONTANA, *County of Lewis & Clarke, ss:*

Be it remembered that on this first day of July, A. D. 1895, personally appeared before me, Harry H. Yeager, a notary public in and for county of Lewis & Clarke, and State of Montana, the St. Louis Mining & Milling Company of Montana, by and through William Mayger, its duly authorized agent and attorney in fact, personally known to me to be the same person described in and who executed the said foregoing instrument as such agent and attorney in fact, who duly acknowledged to me that, as such agent and attorney in fact, he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

24 In witness whereof I have hereunto set my hand and affixed my official seal this the day and year first herein in this certificate written.

[NOTARIAL SEAL.] HARRY H. YEAGER,
Notary Public.

[Endorsed:] No. 291. (Title of Court and Cause.) Answer to Supplemental Complaint. Filed and entered June 30, 1899. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the fourteenth day of July, 1899, the replication of said plaintiff was filed, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 291.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Replication.

And the said plaintiff, for replication to the answer of the said defendant and the new matter set up by way of estoppel in said defendant's answer, waiving no objections to the competency of the same in this action at law, as to the third paragraph in said
25 answer, denies that plaintiff is estopped for any of the causes or reasons set up in the said answer, or any other cause or reason, from claiming any of the mineral found, or that may be at any time hereafter found, in said thirty-foot strip or compromise ground.

Admits that the said bond was executed as in said answer stated, and avers that the same was executed and made on account of an application of the said Mayger for a patent to the said St. Louis Lode Mining Claim, and on account of an adverse claim interposed by the said defendant's predecessor in interest of said thirty-foot strip or compromise ground, as being a part of what is known as the said Nine Hour Quartz Lode Mining Claim.

Admits that the said Mayger agreed to convey said thirty-foot strip or compromise piece of ground, with all the minerals therein contained, to the predecessor in interest of the said defendant, and avers that the said claim of plaintiff comprises no minerals contained in or beneath said thirty-foot strip or compromise ground, except such as is contained in leads, lodes, or ledges, which have their tops or apexes within the St. Louis Quartz Lode Mining Claim, exclusive of said thirty-foot strip or compromise ground.

And the said plaintiff further avers that it is seeking to recover only such quartz-rock or ore and the value thereof, and the damages for the removal and conversion of the same, as comprises lodes, leads or ledges having their tops or apexes within the boundary lines of the said St. Louis Lode Mining Claim, exclusive of the said thirty-foot strip or compromise ground.

26 Admits that said Mayger obtained a patent for the said thirty-foot strip or compromise ground, but denies that any conveyance was made by him to plaintiff to defraud any one, and avers that all matters in relation thereto have been concluded by the judgment of the Court and the deed mentioned in said defendant's answer executed in pursuance thereof.

And the said plaintiff, for further replication to the new matter set up in the said defendant's answer, shows unto this Honorable Court that the said thirty-foot strip or piece of compromise ground

comprised a part and portion of what was known as the Nine Hour Lode Claim mentioned in the said defendant's answer, and that no other right or title has been conveyed by reason of the said deed than such as attached and incident to the said thirty-foot strip or compromise ground, and that the minerals therein contained were intended to compromise and did comprise only such minerals as were contained in veins, lodes, or ledges having their tops or apexes inside of the said thirty-foot strip, all of which will more fully appear by reference to a certified copy of the judgment-roll in the case hereinbefore referred to and filed in the equity suit in aid of this action, and which plaintiff asks may be considered in this cause as though reproduced and fully set forth at large.

And plaintiff alleges the fact to be that the said thirty-foot strip or compromise ground was at all times a part and portion of the quartz-lode mining claim, known as the Nine Hour Claim, and that the same was never a part or portion of the St. Louis
27 Quartz Lode Mining Claim mentioned in the complaint herein, and that in an action heretofore pending between the parties hereto in District Court of the First Judicial District of the State of Montana, in and for the county of Lewis & Clarke, in which said action the defendant herein was plaintiff, and this plaintiff and Charles Mayger, one of its predecessors in interest, were defendants, which said action was based upon the agreement mentioned in said answer and was brought for the purpose of compelling the defendants therein, in accordance with said agreement to execute and deliver to the plaintiff therein a good and sufficient deed for the premises known as the thirty-foot strip or compromise ground and mentioned in the answer in this action, it was found and determined by the Court, as a matter of fact, that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour Lode Mining Claim, and was by the parties to said agreement agreed to be a part thereof, and that the said agreement with the said Charles Mayger, a copy of which is attached to the amended answer herein, was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim, the boundaries of which claims had been and were at the time of the execution of the said agreement in conflict, and concerning which a controversy then existed between the parties to said agreement; and plaintiff further alleges that the deed mentioned in said answer, and a copy of which is annexed thereto, is the deed
28 which the Court adjudged in said action should be executed for the purpose of performing the agreements above referred to.

Wherefore, plaintiff demands judgment as heretofore demanded in its amended and supplemental complaint.

E. W. TOOLE AND
THOMAS C. BACH,
Attorneys for Plaintiff.

STATE OF MONTANA, *County of Lewis & Clarke, ss:*

William Mayger, being duly sworn, deposes and says: That he is an officer, to wit, the superintendent and general manager of the above-entitled plaintiff, which is a corporation; that he has read the foregoing replication, and knows the contents thereof; and that the matters stated therein are true to his best knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this fourteenth day of July, 1899.

[SEAL.] HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, Montana.

Due and timely service of a copy of this replication acknowledged and admitted this fourteenth day of July, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

29 [Endorsed:] No. 291. (Title of Court and Cause.) Replication. Filed and entered July 14, 1899. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of July, A. D. 1905, the verdict of the jury was filed herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess its damages at the sum of one hundred and ninety-five thousand and no/100 ($195,000.00) dollars.

H. G. PICKETT, *Foreman*

[Endorsed:] No. 291. (Title of Court and Cause.) Verdict. Filed and entered July 7th, 1905. Geo. W. Sproule, Clerk.

30 And thereafter, to wit, on the 7th day of July, A. D. 1905, a judgment was duly entered herein which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

ST. LOUIS MINING AND MILLING COMPANY (a Corporation), Plaintiff,

vs.

MONTANA MINING COMPANY, LIMITED (a Corporation), Defendant.

Judgment.

Be it remembered, that on the 29th day of May, A. D. 1905, the above-entitled cause came on for hearing, and the same having been duly submitted to a jury of twelve lawful men duly empaneled and sworn to try the issues herein, the following verdict was duly returned into court, to wit: "Title of Court—Title of Cause.

We, the jury in the above-entitled cause find for the plaintiff, and assess its damage at the sum of one hundred and ninety-five thousand dollars ($195,000.00).

H. G. PICKETT, *Foreman.*"

31 It is therefore considered, ordered and adjudged, that the plaintiff have and recover from the said defendant the sum of one hundred and ninety-five thousand dollars ($195,000.00), together with its costs in this behalf expended, taxed at the sum of nine hundred twenty-six and 80/100 dollars ($926.80), and that it have execution therefor.

Dated this 7th day of July, A. D. 1905.

Judgment entered July 7th, 1905.

[SEAL.] GEO. W. SPROULE, *Clerk.*

Attest a true copy of judgment as entered.

[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES OF AMERICA, *District of Montana, ss:*

I, Geo. W. Sproule, clerk of the United States Circuit Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 7th day of July, 1905.

[SEAL.] GEO. W. SPROULE, *Clerk.*

[Endorsed:] No. 291. (Title of Court and Cause.) Judgment-roll. Filed and entered July 7th, 1905. Geo. W. Sproule, Clerk.

32 And thereafter, to wit, on the 14th day of August, A. D. 1905, a bill of exceptions was duly allowed, signed, and thereafter filed, which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Bill of Exceptions.

Be it remembered that the above-entitled cause came on for a retrial on the 31st day of May, A. D. 1905, that being one of the days of court of the April term of said court, on a remittitur from the Circuit Court of Appeals, of which the following is a copy, to wit:

Remittitur.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Montana, Greeting:

Whereas, lately in the Circuit Court of the United States for the District of Montana, before you, or some of you, in a cause
33 between the St. Louis Mining and Milling Company of Montana, Plaintiff, and the Montana Mining Company, Limited, Defendant, No. 291, a judgment was duly filed and entered, which said judgment is of record in the said cause in the office of the clerk of said Circuit Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as fully and at large appears by the inspection of the transcript of the record of the said Circuit Court, which were brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of, respectively, a writ of error on behalf of the Montana Mining Company, Limited, allowed on the 7th day of October, in the year of our Lord one thousand eight hundred and ninety-nine, entitled The Montana Mining Company, Limited, *vs.* The St. Louis Mining and Milling Company of Montana, No. 567, and a writ of error on behalf of the St. Louis Mining and Milling Company of Montana, allowed on the 30th day of January, in the year of our Lord one thousand nine hundred, entitled, The St. Louis Mining and Milling Company of Montana *v.* The Montana Mining Company, Limited, No. 594, agreeably to the act of Congress in such cases made and provided;

And whereas, on the 9th day of February, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Circuit Court of Appeals, on the transcript of the record upon the said writ of error on behalf of The Montana Mining Company, Limited, and was duly submitted;

And whereas, on the 14th day of May, in the year of our
34 Lord one thousand nine hundred, in the said cause upon the said writ of error on behalf of the Montana Mining Company,

Limited, a judgment was duly filed and entered by the said Circuit Court of Appeals affirming the said judgment of the said Circuit Court; from which judgment of the said Circuit Court of Appeals, a writ of error on behalf of the Montana Mining Company, Limited, was thereafter duly sued out and allowed to the Supreme Court of the United States;

And whereas, on the 14th day of May, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Circuit Court of Appeals on the transcript of the record upon the said writ of error on behalf of the St. Louis Mining and Milling Company of Montana, and was duly submitted;

And whereas, on the 8th day of October, in the year of our Lord one thousand, nine hundred, in the said cause upon the writ of error on behalf of the St. Louis Mining and Milling Company of Montana a judgment was duly filed and entered by the said Circuit Court of Appeals reversing the said judgment of the said Circuit Court and remanding the cause for a new trial in respect to certain alleged damages; from which judgment of the said Circuit Court of Appeals a writ of error on behalf of The Montana Mining Company, Limited, was thereafter duly sued out and allowed to the Supreme Court of the United States;

And whereas, on the 19th day of May, in the year of our Lord one thousand nine hundred and two, as appears from the man-
35 dates issued out of the said Supreme Court of the United States to the said Circuit Court of Appeals and filed on the 9th day of June thereafter, the aforesaid writs of error on behalf of the Montana Mining Company, Limited, sued out and allowed to the said Supreme Court of the United States as aforesaid, were dismissed, for the want of jurisdiction;

And whereas, on the 6th day of October, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said Circuit Court of Appeals on the said transcripts of the record and the petition of the Montana Mining Company, Limited, for the issuance of a single mandate in the cause, etc., and was duly submitted;

And whereas, on the 8th day of October, in the year of our Lord one thousand nine hundred and two, the following judgment was duly filed and entered:

36 "United States Circuit Court of Appeals for the Ninth Circuit.

Nos. 567 and 594.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff in Error,
vs.
THE MONTANA MINING COMPANY LIMITED, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Montana.

This cause having come on to be heard on the transcripts of record from the Circuit Court of the United States for the District of Montana upon the writ of error sued out by The Montana Mining Company, Limited, Plaintiff in Error, *vs.* The St. Louis Mining and Milling Company of Montana, Defendant in Error, and upon the writ of error sued out by The St. Louis Mining and Milling Company of Montana as Plaintiff in Error *vs.* The Montana Mining Company,
37 Limited, as defendant in error, both writs of error being sued out to correct errors charged concerning the same judgment, and said causes having been argued and submitted by counsel, and separate judgments having been made and entered therein at different dates, and the Court having by its last judgment herein reversed the judgment of the said Circuit Court:

It is now ordered and adjudged, that the judgments so heretofore made and entered herein be vacated and set aside, and that in lieu thereof it is ordered and adjudged that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs, and the cause is remanded to said Circuit Court for a new trial."

You, therefore, are hereby commanded that such new trial and further proceedings be had in said cause in accordance with the judgment of this Court filed and entered on the 8th day of October, in the year of our Lord one thousand nine hundred and two, and as according to right and justice and the laws of the United States ought to be had, the said judgment of the said Circuit Court notwithstanding.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of October, in the year of our Lord one thousand nine hundred and two.

F. D. MONCKTON, *Clerk.*

Taxation of costs: Total taxes at $242.50.

[Endorsed:] Title of Court. Title of Cause. Remittitur. Filed and entered Oct. 31, 1902. Geo. W. Sproule, Clerk. By F. H. Drake, Deputy Clerk.

38 The jury having been duly impaneled and sworn to try said cause, the plaintiff to maintain the issues on its part introduced and had sworn one John R. Parks who testified substantially as follows, to wit:

JOHN R. PARKS.

I am a consulting mining engineer and have followed my business for twenty-five years. I entered the employment of the plaintiff in this case in that capacity about the year 1892, and have been continually in its employ since that time, though I have been engaged in other matters during that period. As such engineer, I assisted in making the map used in this case known as Plaintiff's Exhibit No. 1. My associate in that work was Mr. James Keerl, who is a civil engineer by profession. The map is a colored photograph from a tracing of the original working mining map and it is a correct representation of the exterior boundaries of the St. Louis claim so far as exhibited. It is very accurate throughout.

The photograph, in order to distinguish levels, was colored by Mr. Keerl and myself as you see on this map. The map is, what is termed by engineers, a plane map. In other words, it is a map on a horizontal plane and as if you were looking down on the object depicted. As to the colors, the 400-foot level appears in a dark gray, the 85-foot level in a brownish yellow, the 40-foot level in red, the 20-foot level in yellow, the 50-foot level in blue, the 190-foot level in brick red. The connection on the vein either from level to level, or from the surface to a given level, is either a shaft when it
39 comes from the surface, or a winze when it comes from level to level. When we look down from the surface, a shaft appears to us simply as a straight line and is represented on the map in black parallel lines. The Montana nine hour shaft is from the surface to the 190-foot level. Now, as that shaft does not run in a straight line on that vein, the lines change to an angle to show that fact. As looking down from above, you could see only the top of a shaft, it is depicted on the map by a square, a part of which is in deep black and the other in outline. The stoped ground shown in the southeasterly portions of the map is outlined in black lead pencil which gives it a dark grey figure. The plane, called datum plane, upon which this map is drawn, is the assumed altitude of corner No. 2, 2,000 feet, so that anything that is under two thousand feet is below the datum plane, anything that is above it is up higher on the hill.

The vein is found on the flank of a mountain, the surface of which is very irregular. The mountain rises at an angle of about 30°. The 520-foot plane is 520 feet from corner one, and is parallel to the north end line and is marked on the map "projected line parallel to the end line 520-foot plane." The 108-foot plane and the 133 plane are also designated and are respectively 108 and 133 feet distant from the intersection of the west side line of the 30-foot strip with the east side line of the St. Louis claim between corners one and two. On this map when you find a level defined in the same

color and two parallel lines connected with a color connection,
40 that is a cross-cut. The 65-foot shaft is a shaft sunk on the St. Louis discovery vein. The 65-foot cross-cut is 87 feet below the 85-foot level. The points marked "discovery shaft" and "discovery drift" show the location of workings on the discovery vein. What is designated on the map in sort of a bluish green color, is the Transcontinental tunnel which is driven on a fault fissure. Following along the line of the Drumlummon lode are surface cuts marked on the map. These are outlined in black ink and marked and numbered as cut No. 12, No. 13, etc.

Cross-examination:

I first became acquainted with the vein or lode in controversy in '91 or '92. My work was not entirely for the purpose of getting evidence for lawsuits, pending between these parties, but a good part of it was for that purpose. The surveys for this map were made in 1892 or 1893. The complaint in this action was filed in '93. I assisted Mr. Keerl in making the surveys and in drawing the maps. The boundary lines were taken from the United States patents. The west line of the nine hour does correspond to the line shown on the patent. The map shows the west side line of the nine hour to the point where it intersects the south boundary of the St. Louis claim. On the diagram in the patent a line is shown from the point of such intersection to corner numbered 1 of the nine hour but the area thus shown in conflict with the St. Louis is expressly excluded in the patent.

41 Plaintiff also called and had sworn as a witness in its behalf who testified as follows, to wit:

William Mayger.

I reside at Marysville, Montana. My business is mining. I have been engaged in that business for about 41 years, principally around Silver Camp and Marysville. I know the St. Louis Lode Claim. It lies southeast of the town of Marysville on the side of a mountain, known as Cruse mountain. The original location of the St. Louis Lode, was at the point marked on the map as the 65-foot shaft. There is a vein connected with that original discovery.

Whereupon the witness was asked the following question:

Q. Which direction does it run?

To which the defendant objected on the ground that the same was irrelevant and immaterial. For that, the direction or strike of the discovery vein is not in issue, being no allegation whatever contained in the complaint relating to the strike or dip of the discovery vein, which objection was overruled by the Court, and the witness permitted to answer such question, to which said ruling of the Court, the defendant then and there excepted.

A. It runs very nearly parallel with the side lines of the St. Louis as staked. We have traced the vein to within 95 feet of the end line at the south end, and to a distance of about 400 feet from the north

end. It dips to the east at an angle of about 80° from a horizontal. We have sunk on this vein, to a depth of about 425 feet. The
42 St. Louis company has extracted over forty-one thousand dollars' worth of ore out of the discovery vein in both the north and south drifts from the Transcontinental tunnel. That part of the vein disclosed in the southerly drift of the Transcontinental tunnel is developed on the lower levels to within 95 feet of the south end line, and it is a good, strong, vein at that point extending in the direction of the end line.

I know the Drumlummon vein. At the point on the map designated as the 520 foot plane, the hanging wall of the Drumlummon vein is within the St. Louis claim, by a distance of about 5 feet, and the apex is wholly within the St. Louis claim, from that point to the 108-foot plane. It runs parallel or comparatively so with the St. Louis, between corners numbered 1 and 2, and the dip is to the east, at an angle of 56 to 60 degrees at the surface, and on the lower levels as high as 70 or 72 degrees. I have examined the lower levels of the vein down to the 1600-foot level of the Montana company. The hanging-wall of this vein passes out of our surface at the 108-foot plane as marked on the map Plaintiff's Exhibit No. 1, and a part of the apex of the lode continues in our ground until it passes the 133-foot plane.

The Montana company has stoped out the ore above the 190 level up to the 108-foot plane. We have traced the hanging-wall clean up to the 108-foot plane, and the foot-wall to within 160 feet, I should judge, of the south end line. We have run levels on the walls, and traced them all through the levels. I have made this vein
43 a study for years. Our apex shaft No. 2 practically joins on the surface the Montana company's apex shaft, and lies south of the 108-foot plane, about 5 feet. The other side of the shaft is within about 15 feet of our 133-foot plane. The workings here are much caved. It is possible that one could climb down the Montana company's apex shaft, but it is much crushed and caved.

The 20-foot level shown on the map is marked in pale yellow. It starts from probably 60 or 75 feet west of its intersection with the east side line of the St. Louis ground and follows the vein in and connects with the Montana company's apex shaft. Underneath that level we started what is termed the Roadside tunnel; that is a cross-cut tunnel and penetrates the vein immediately under the St. Louis company's apex shaft, then it follows the vein south until it passes beyond the 133-foot plane, and from there it turns and runs back; runs west until it intersects the foot-wall of the vein. Below the 40-foot level and the roadside tunnel, we have got what we term the 85-foot level, which connects at the north end with the 30-foot level, on the hanging-wall of the vein north of the 520-foot plane, and connects that level with a raise in two places on the south end of that level. From that point it follows as near to the surface as it can. Immediately under the hanging-wall of the Drumlummon, it reaches the winze that connects the forty-foot level with the 85-foot level. The vein is disclosed under the hanging, its entire length up to that point.

Within that distance there are a number of cross-cuts that
44 run to the foot-wall of the fissure or vein. The first cross-cut to the foot is at a point in the level marked "4" on the map, being one of the stations of the survey of the 85-foot level. The vein at that point is 21 or 22 feet in width. Going southerly along the level from that point a distance of about 60 feet, there is another cross-cut that runs to the foot-wall. From the end of this cross-cut is a level following the foot-wall clean through to immediately behind the winze of the St. Louis company, between the 40-foot level and the 85-foot level. From the foot to hanging-wall is a distance of about 17 feet. From where the 85-foot level terminates, going northerly for about 60 feet, the ore has been entirely stoped out up to the surface, by the St. Louis company, that is, the greater portion of the vein, leaving a lot of low-grade ore between the stope and the foot-wall. There is a brattice in the level at the bottom of the winze. I have found pay ore within 8 or 10 feet of the point where the 133-foot plane crosses the west line of the compromise ground and down below, I have found ore immediately underneath that point. Witness here produced a sample of the ore found beneath the crossing of the 133-foot plane.) I do not remember the exact point at which I found this ore, but think it was about 20 feet below the surface. The 85-foot level is partly in the gouge following the hanging-wall, with very little in it and has no particular value up to the point of the beginning of our stope.

45 From the portion of the vein that we stoped out, we realized $111,000.00 out of it. The average of it would be $100.00 a ton. We shipped a good deal of ore there that might be termed float in connection with the vein immediately below the apex. We were confined to a vertical plane on all sides by an injunction covering the thirty-foot strip. I have been in the premises of the defendant east of the west side of the line of the compromise strip. The ground at this point is stoped out from the surface down to the 190-foot level of the Montana company.

Whereupon the witness was asked the following question:

Q. Point out to the jury northerly of the 133-foot plane, where the stopes have been taken out.

To which question the defendant objected for the reason that the same is irrelevant and immaterial, for the reason that the stoping referred to lies north of the 133-foot plane, as drawn on the map, and is not confined to such stoping as has been done in that portion of defendant's ground where the apex of the lode is found in plaintiff's ground, lying north of the 108-foot plane. In other words that the inquiry relates to the territory lying between the two planes as drawn on the map, and that it has been established by the testimony and by the pleadings in the case, that between these planes the whole of the apex is not within the plaintiff's territory.

The Court in overruling said objection, said:

"I do not deem it necessary to consider with the very
46 strictest exactness the definite line between what is termed the law of the case and what may be called an advice by an ap-

pellate to an inferior court. But I hold this to be a correct principle, that where a trial court has ruled upon a material matter in one way, and an appeal is taken to a higher tribunal and such higher tribunal considers the question presented as necessary for its consideration, and does duly consider such question, and does express a positive opinion thereon, and makes a decision that the trial court erred in its refusal to admit evidence upon the direct question considered, and therefore remands the case for a new trial, it becomes the duty of the trial court upon such new trial to follow the opinion of the appellate tribunal, unless it should be made to appear that a substantially different state of facts exists from that upon which the appellate tribunal based its decision, or unless the appellate tribunal was clearly misled as to the facts by accident or omission of some kind, or unless the decision of the appellate tribunal or its reasoning has been reversed by a still higher tribunal.

"I find, upon the examination of the opinion of the Circuit Court of Appeals in this case, 104 Fed. 664, that the question considered was this: 'When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim, and partly within the other, to whom does such portion of the vein belong?' The Court answered this question by
47 referring to the opinions of the Supreme Court of the United States, stating that 'The only deduction which can be made from the foregoing views is that inasmuch as neither statute permits a division of the crossing portion of the vein, and the weight of authority favors a senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line.'

"Continuing, the Court says: 'It follows that the court below erred in its refusal to admit the evidence offered as to the value of ore taken from the Drumlummon vein on its dip between the planes designated as the 108-foot and the 133-foot planes, and the cause is therefore remanded for a new trial, as to damages alleged and recovery sought for conversion of ore between the planes indicated.'

"Any other general rule than that which I have laid down would be countenancing the doctrine that if a trial judge may entertain an opinion different from that expressed by the appellate tribunal within his circuit, he may, by refusing to follow such higher court, interfere with the orderly administration of judicial proceedings which very plainly must be preserved for the harmony of the entire system of jurisprudence. The effect of such a course would be to impair the stability of judicial decision by the higher courts and oftentimes to throw the burden of appeal upon him who has been declared in the right by the higher court, and as a consequence the adminis-
48 tration of justice would be unnecessarily delayed and confusion ensue.

"Were the difficult question presented, a new one to me apart from the advice of a learned Circuit Court of Appeals, the duty would, of course, devolve upon me to decide it by original opinion. Upon the point itself, which is complex, while I realize that there is force in

the argument of the counsel for the defendant; on the other hand, the Circuit Court of Appeals, in making its deduction from the decision of the Supreme Court referred to in its opinion, rests upon the fundamental doctrine that the intent of the statute is to preserve to the minor the full benefit of his discovery, and that in expounding the law courts should not lose sight of the rule that if the miner has the apex in his location he is to have the vein, and the right of pursuit of the vein on its dip as defined by the statute, and that the senior locator, in the absence of statute and authority is to be favored under conditions of facts like those presented in this case.

"But as the rights of the parties hereto are to be determined upon this trial by the unmistakable language of the Circuit Court of Appeals, any reasoning of mine upon the question, which is difficult, would not be of material concern."

Thereupon the defendant added to its objection aforesaid that it was alleged in the pleadings and shown by the testimony,
49 that the hanging-wall of the Drumlummon vein passed out of the plaintiff's ground at the 108-foot plane.

But the Court overruled such objection and the whole thereof, to which ruling of the Court the defendant then and there duly excepted. And it was stipulated between counsel in open court that said objection should apply to all testimony that might be offered or given relative to any ores mined by the defendant, between the two planes as drawn down on the map. The same stipulation, it was agreed, should cover all testimony offered by plaintiff relating to the course or dip of its discovery vein, and that defendant need not further object to such testimony, the objection already made being sufficient.

A. The entire vein is stoped out between the 108 and the 133-foot planes, from the surface to the 190-foot level of the Montana company's works. There is a stope at the end of the 190-foot level from the 133-foot plane in beyond the 108-foot plane, possibly 30 or 35 feet. The last end of that level for a short distance has no stoping above it, but from the point where the stoping begins to the 133-foot plane, it has been stoped out up to the surface, by the defendant. There is a stope at the end of the 85-foot level which is entirely north of the 108-foot plane. There is also a stope commencing about 30 feet below the apex of the Montana company's shaft, and extending into the 20-foot level, probably 10 or 12 feet.

I am the general manager of the St. Louis Mining and Milling Company, and have been such manager since the organization
50 of that company. I think the ore extracted by the Montana company at the points named by me, was much better ore than that which we extracted north of the compromise line. I had Professor Parks and Mr. Keerl measure up the stopes taken out by the defendant and compute the number of tons that had been so taken. I took the sample of ore referred to by me, vertically under the 133-foot plane at the point marked "J" on the map at a depth of about a foot below the elevation of point "J," which would be about 65 feet below the surface of the datum line.

The stope at the end of the 190-foot level was taken out in the

summer of 1893, also the stope on the 20-foot level. I believe this is termed Block 9. The stope marked Block 8 at the end of the 85-foot level was taken out in '98 or '99. These numbers were given these blocks by our surveyors at the time of the making of the survey. The value of the ore taken out by us ran from $50 to $300 a ton, estimating it in carload lots. In giving my valuations, I gave the valuation as net returns, not the assay value, but what we received back from the smelter, which was 95 per cent. of the assay value, and deducted the cost which reached all the way from $12 to $24 a ton. The ore bodies mined out by us on our side of the line and the ore bodies mined out by the defendant on its side of the line adjoined each other. While the defendant was engaged in extracting this ore, I made efforts to get into its property to see it, but I only got in under an order of the Court. I was refused
51 admission to their mine, until I had obtained an order. I went in with Professor William B. Potter of St. Louis, in either 1894 or '95. I have also been in there with other persons since then under similar circumstances.

The location of the St. Louis was made in September, 1878, but there had been a prior location of the same ground. I was in Butte at the time it was located and I wrote from there to my brother Charlie, who was in Marysville, directing him to make the location. The location was made on what we term the 65-foot shaft.

Cross-examination:

The location was made by my brother, in his own name. I had no legal interest in it. I was one of the organizers of the St. Louis Mining and Milling Company. Mr. James Sommerville and Mr. Michael Karnett of St. Louis were also interested in it. After the company was organized, one-half of the stock was issued to me, and one-half of it to my brother Charlie. I presume I paid the expenses of patenting the claim and also the expenses of fighting the adverse suit. The company at the time of its organization had no other property than the St. Louis lode and millsite, except that $125,000.00 of the capital stock was put into the treasury. I have always been the manager of the company. The adverse suit was settled by the execution of the bond spoken of in the answer in this case. There was a demand made for the performance of the bond in the spring of 1887. I participated in the suit for the specific performance of the
52 bond. The suit was appealed to the Supreme Court of the United States, and resisted by the St. Louis Company. I executed the deed for the company under the order of the court. I had charge of the litigation between the parties to this action in the former suit. That case was tried in April and May, 1893.

I have no absolute knowledge as to my seeing the original notice of location posted at the 65-foot shaft. I assume that my brother Charlie made that discovery on the 65-foot shaft and assume that was his discovery shaft. What is marked here on the map as the discovery shaft was known as the discovery shaft of the Ivanhoe lode. I did not say to the jury on my direct examination that I saw the notice of location posted on the 65-foot shaft.

If the notice of location was posted on the 65-foot shaft when I got back from Butte, I would assume that that was the discovery shaft of the St. Louis lode and should be so marked on this map. Tracing the lode on the surface, there is a shaft or prospect hole near the south line, but it is not connected with any of the underground workings. I assume that it is a continuation of the vein. There are no other workings on the surface near the south end in which the vein is shown. Its course, however, is shown by the stopes below. We commenced prospecting for the vein in 1876; we located the Ivanhoe. We did not hunt any more for the vein after 1878. In the bottom of the 65-foot shaft there is a level running south for a distance of 140 or more feet, the discovery
53 vein dips to the east. The level I speak of runs to the Transcontinental tunnel, that tunnel cuts the vein and throws the lead a distance of about 90 feet. The level that runs from the Transcontinental tunnel to the 65-foot shaft continues on in the same direction a distance of probably two or three hundred feet further. It it not on the map because it was never surveyed by an engineer.

In the Maskelyne shaft, the width of level on the Drumlummon vein appears to be about 7 feet wide as shown on the map. The narrowest point shown is about 4½ feet. In running the cross-cut from the bottom of the 65-foot shaft, we struck a bunch of quartz about midway. The breast of this cross-cut shows the Drumlummon vein.

The cross-cut is entirely through the vein up to the hanging-wall of the Drumlummon. The gouge on the hanging-wall of the Drumlummon appears in the Hopeful shaft, it also appears in the upraises from the 30-foot level to the surface, and from that point right along to the 85-foot level clean through. This gouge can be traced clear through the 85-foot level to where the brattice is, with the exception that at the south end of the 85-foot the ground has all been stoped out and it does not show there. It is continuous; sometimes it is two feet wide, sometimes only two or three inches wide, but there is always more or less of it. At Cut No. 14 as you stand where the track turns and look at the face of the 85-foot level, the gouge shows very clearly. In the cross-cut of the 65-foot shaft there
54 is a bunch of ore in there, I think, as far as I can judge, it dips to the west. That is my memory as it is pictured in my mind. The Transcontinental tunnel is marked on the map in green, the end of it is over in the Nine Hour ground, and under the Nine Hour ground a distance of probably thirty feet clear past the east side line of the Compromise strip. It runs to the north of these two apex shafts. The tunnel runs practically 500 or 600 feet underground and follows a fault in the granite. It is through porphyry and granite near the mouth of the tunnel. The dip of this fault is to the south. We left the fault at a point immediately under the easterly end of cut 18. I think our caps in this tunnel are 6 feet, I am not sure. There has been no work on the main shaft of the St. Louis on the north end since the shaft was built there. I could not give you the year exactly when the work was done. The 30-foot level north of the shaft is on the foot-wall possibly a distance of 30

feet. It trends towards corner No. 1 of the St. Louis location. It possibly extends northerly 30 feet from the main shaft. There is a cross-cut north of the shaft. I do not remember just how far from the shaft. The cross-cut is a cross-cut to the east. In cut No. 14, both walls of the vein appear 12 or 14 feet apart. At the point, cut No. 14, the vein is 12 or 14 feet wide. On the map of 1893, the apex is represented by a pink band showing a width of about 37 feet by scale. The Transcontinental tunnel fissure passed over
55 the foot-wall of the Drumlummon vein and crossed over the vein. We developed the foot-wall of the Drumlummon vein to within 150 feet of the south end line of the St. Louis vein at the 20-foot level. We had a workman on this end, on Saturday the 29th of May last, developing the foot-wall of the vein.

Whereupon witness was asked the following question:

Q. If that man were at work 78 feet below corner No. 3, and there had been any foot-wall there, will you tell me the width of that apex provided the hanging-wall took the course you indicated by your ruler from the 108-foot plane crossing through the Nine Hour shaft?

To which question the plaintiff objected for the reason that the question assumed a condition that the witness had not sworn to, and therefore not proper examination and immaterial.

Which objection was by the Court sustained.

Whereupon the defendant offered to prove in response to the question that the distance from the point indicated to the plane previously indicated by the witness from the 108-foot plane through the Nine Hour shaft, would be approximately 148-feet surface apex on the south end line.

To which offer the plaintiff objected upon the same grounds.

Which objection was by the Court sustained, and the defendant duly excepted thereto.

The Montana company took out a small stope of ore from their apex shaft running north on the 20-foot level That is the
56 highest working outside of their shaft north. This ore that I am speaking of was taken out in '93. The ore that we took out to the northward of the 108-foot plane was west of the west side line of the 30-foot strip and northward of the apex shaft No. 2 to the point where the hanging crosses the west side line of the 30-foot strip. It might have been 60 feet northward of the 108-foot plane. We stoped between the 85 and the 40 foot as far east as the plane of the compromise line, and between the 40 and 18 or 20-foot level up to the surface. The stope was all the way from 3 to 6 feet, possibly 7 feet wide. We took out all the richest ore. The stulls in timbering average from 2 to 4 or 5 feet. It varies from three to seven feet, the cap would be full width of the level. I would not say that they were over 3½ feet on the surface where you could notice them, because I never noticed it.

When I said in my direct examination that the $111,000 of ore yielded over $100 per ton per carload lots, I meant net after paying all costs, railroad fares, shipping costs, smelter charges, but not hauling from the mine to the railroad. The mining cost is about $1.50

a ton. We have paid as high as $2.00 or $3.00 per ton for mining. The best ore went $300.00 a ton, the worst about $50.00. It was all handled at the smelter or the Big Ox Mill. The report that you showed me is one that I made my company, and the 3260 dry tons of ore referred to in the report yielding gross $111,490.19 is
57 the same ore and the same product that I said yielded $111,-000.00 in the direct examination.

Thereupon as a part of the cross-examination the portion of said report referring to said ore was read in evidence, said report bearing date January, 1901, as follows:

"We have mined and stoped from the Drumlummon vein 3,260 dry tons of ore at a cost of $6.00 per ton or a total of $19,560.00. We shipped 1300 tons of this ore to the smelters, for which we received, after paying freight and smelter charges, $64,539.87; the remaining 1960 tons was shipped to the Big Ox mill, from which we realized in retort and concentrates $46,950.32.

Recapitulation: Mining 3,260 dry tons of ore, $19,560; that is on the debit side.

On the credit side: Receipts from ore shipped smelter $64,539.87. Also on the credit side receipts of ore milled, Big Ox Mill, $46,490.19. The debit items are made up of the mining cost just stated, mining 3,260 dry tons of ore, $19,560. Excess of receipts above expenses $91,930.19."

Redirect:

On redirect examination the witness was interrogated and replied as follows:

Q. You testified on your direct examination about the course of your discovery vein as compared with the Drumlummon. I forgot to ask you about the map. I have had another map made since. I would like to do so now, as part of my direct. I will ask
58 you to look at that map (showing witness map) and see if the general course and the general situation is illustrated by it?

A. I think, generally speaking, it does, so far as I know anything about it.

Q. Do you know who prepared that map, or rather the little ones from which that is a copy?

A. No, sir, I do not.

Q. Do you know who prepared this one (showing witness a small map)?

A. No, sir, I do not know who prepared it.

Q. I will ask you whether that is a fair illustration so far as you know it. Here is the little one I think you have seen before. One is a copy of the other.

A. I think it is a fair enough illustration. The discovery vein there, according to my idea, there is not so much of a throw on the fault line the two ends ought to be nearer together here, and this line out here (indicating) ought to be a little bit higher up toward that point, otherwise it is all right.

Whereupon plaintiff offered the said map in evidence.

To which the defendant then and there objected for the reason that

it contradicted the map that had already by stipulation been attached to the complaint in the action, in that it showed the departing foot-wall to be at a point southerly of the 133-foot plane and carried the foot-wall out through both of the end lines of the claim. Also for the reason that there is no testimony showing when, by whom,
59 or for what purpose the map was made, and that it was a contradiction so far as the course of the discovery vein was concerned, of the map introduced in evidence and marked Plaintiff's Exhibit No. 1. It also contradicted the testimony of the witness on the stand in that it showed the departure of the hanging-wall of the vein at a point 240 feet northward of the 520-foot plane.

By the COURT: I think that paper may be used as illustrative of the testimony of the witness.

To which ruling of the Court counsel for the defendant excepted.

(The paper was marked Plaintiff's Exhibit No. 3.)

By the COURT: Do I understand that you offer it formally in evidence?

Senator BROWN: I do not claim that this map is correct at all, I never have claimed it, but I think it illustrates this case. That is the reason I wanted to put it in, and the jury may consider it for what it is worth. If there is no objection I should like to ask the jury to have copies of it.

By Mr. WALLACE: Our objection goes to the entire use of the map as evidence. (Blue print copies of the map were handed to the jury. Counsel for defendant excepts.)

And referring to another map appearing on the flyleaf of a report of the St. Louis Mining Company, the witness was asked the following question:

60 Q. I will ask you if that bears a general resemblance to the general situation of the Drumlummon mining claim to the rest of the property?

To which question the defendant objected for the reason that the same is leading.

But the Court overruled such objection and permitted the witness to answer said question.

To which ruling of the Court the defendant then and there duly excepted.

The witness answered:

A. That would be correct if the discovery shaft of the Drumlummon was set a few hundred feet further to the north.

Plaintiff also called and had sworn as a witness in its behalf, one Walter Proctor Jenny, who testified substantially as follows:

WALTER PROCTOR JENNEY.

I am consulting geologist and mining engineer. I was educated in the Columbia School of Mines. I have examined the discovery vein of the St. Louis Lode Mining Claim. Its course is substantially northeast and southwest. I believe that the discovery vein extends

the full length of the claim from end line to end line. Explorations under ground shows that it lies within 750 feet of the north end line, and in the south end it is tracted to within 95 feet of the end line. I find an outcrop within 150 feet of the north
61 end line which I believe to be the outcrop of this discovery vein. The dip of the vein is easterly from 70 to 85 degrees. I know the Drumlummon vein; it enters the St. Louis claim at the 520-foot plane as shown on the map. And from that point to the 108-foot plane, it is entirely within the St. Louis surface. The width of the vein from the hanging to the foot-wall is not uniform, at one point it is only 4 feet and 8 inches, while the greatest distance I find the walls apart is approximately 45 or 46 feet. The material between the walls is crushed and fractured country rock. In some places converted into quartz and mineralized, and at still other places there is ore of sufficient value to work and ship. At the 108-foot plane, the hanging-wall passes into the compromise ground, and between that point and the 333-foot plane there is, going westward from the hanging-wall, 7 feet of quartz which has been stoped and removed. There is next this going west, about 8 feet of quartz. A good part of it is still standing. The width of the vein measured along the 108-foot plane, but not at right angles to the vein is 55 feet. The vein crosses two porphyry dikes and faults both of them. There is a geological difference between the St. Louis discovery vein and the Drumlummon vein. The strike of the veins are very different. The discovery vein is nearly north 45° to 50° east magnetic, while the general course of the Drumlummon in the ground in dispute is about north 10° east. Then the dip of the St. Louis vein is much more vertical than that of the
62 Drumlummon vein. The discovery vein of the St. Louis is broken up. There is a cross faulting, notably on the Transcontinental level, where the faulting on the tunnel level is 90 feet.

Cross-examination:

I first visited the St. Louis property in July, 1899, and spent 20 days on the ground before the previous trial. I spent about three days, but not all of each day on the discovery vein of the St. Louis. The vein is in granite. The trend of the ore chutes are to the south. I gained entrance to the works through the Transcontinental tunnel. I never went down the discovery shaft. The dip of the fissure in the Transcontinental tunnel varies from vertical to westerly at about 15° from the vertical. The direction or strike of the discovery vein is from 45° east magnetic to north 55°. North 45° east magnetic would be north 65° east true. I first went through the east cross-cut run from the bottom of the 65-foot shaft over to the east side line of the St. Louis and slightly beyond. The Drumlummon vein is very nicely exposed at the end of the cross-cut. The walls at that point are in slate. I observed the dip of the discovery vein, it ran from 70° to 85° sometimes. I do not remember any of the points at which I took the dip. The foot and hanging-wall of the Drumlummon are both disclosed in the drift northerly from the bottom of the 65-foot shaft.

North of the 65-foot shaft and on about the same course
63 as that followed by the vein between the Transcontinental tunnel and the bottom of the 65-foot shaft, a level has been run on the discovery vein for quite a distance, most of it in granite with about 25 feet at the extreme northerly in the slates. The vein seemed to be pinched there. I think the length of the drift on the vein north of the bottom of the 65-foot level is about 100 feet.

There is a strong talc seam on the hanging-wall of the Drumlummon, which shows very distinctly at the entrance of the 85-foot level in cut 14. The width of the vein at this point is about 11 feet between the walls. The slate is quite well marked there in places. There is a talc seam on the hanging-wall which is 18 to 20 inches wide. Probably in no place more than 2 feet wide. It contains finely ground material, clay and talc mineralized with it, some quartz but not much. The vein is poorly mineralized there. The general strike of the vein between the 520 and the 108-foot planes is about north 10° east magnetic. North 30° east true. If the 85-foot level had been driven entirely on the hanging-wall side, the finely ground matter and so on would show to the right of the level as an apparent foot-wall. It is a companion wall to the hanging-wall and would seem like a foot-wall to a miner. It would be strong enough to timber against. The seam on the hanging-wall
is a fissure, and if it contains ore at points, a miner would
64 follow it, taking out all of the valuable ore in the vein. They are apt to be sympathetic fissures in slates running more or less parallel with the fissure of the vein containing ore. Going into the 85-foot level, the first cross-cut you encounter is at point 4. There is some quartz at point 4 on both the right and left-hand side of the level. There is more or less mineralized quartz entirely across the vein at this point. Looking overhead at this point, you see the fissure continuing right through it clearly marked, which indicates that the Drumlummon fissure is younger in point of time than the cross-fissure, as the older veins are cut by the more recent ones. Where there is a cross-fissure of this character we generally expect to find greater mineralization because at such a point opportunity is afforded for a freer circulation of the mineralized solutions and gases.

Going southerly from point 4 there is another fissure near apex shaft No. 1. It comes in from the northeast. Going through this fissure, the course of the Drumlummon vein is clearly marked and the course of this vein is marked throughout the level as far as it can be traced on account of stopes. At the extreme southerly point of this level, the country is a good deal disturbed by cross-fissures.

On the surface the 108-foot plane lies about 5 feet northerly of the sides of the two apex shafts which are located together at that point. The ore practically comes to the surface at that point. In taking out this ore, the stulls or caps used by the miner would
65 be as long as the ore body was wide, but the ore body may not fill the space taken out and occupied by the timbers. There is a little cut at the point where the 133-foot plane inter-

sects the compromise line. The point is caved in and if cleaned out, it would not show the quartz coming up there. The point is about 8 feet distant from the edge of the caving that shows the stoping.

Plaintiff also called and had sworn as witnesses in its behalf, JAMES E. JACKSON, ALEXANDER SWAN and FRANK J. LEEDY, who testified substantially as follows, to wit:

That they were quartz miners; that they had in company with each other and with Mr. William Mayger, plaintiff's manager, visited the premises in controversy on the 30th day of May. That they had started at corner No. 2 of the St. Louis claim, and with a tape line had measured northward to a point 63 feet northerly from said point of commencement; that they had then measured southerly along what was pointed out to them as the west line of the 30-foot strip for a distance of 133 feet. That at said point a small trench was dug, probably two feet in length and 6 inches wide, which extended down to the solid formation, from which they took some samples, which they would term vein matter. That at said point no wall was disclosed. That they then went to the 20-foot level, which they followed to the apex shaft and came out at the surface at that point. That there was disclosed in that level lead matter all the way, from which they took several samples that they considered vein matter. That through that level there
66 was no sign of a hanging-wall. They then went down into the 40-foot level, noting that the ground above them had been stoped and that the stopes were about 7 feet wide. That they went down the winze to the 85-foot level. That on said level, ore had been stoped out clean to the brattice, that is at the end of the level. On the north side of the brattice, they measured from the foot to the hanging-wall and found the distance to be 17 feet. That northerly 85 feet from the brattice there was a cross-cut where the width of the vein was again measured and found to be 21 feet. The material between the points being vein matter.

The plaintiff also called and had sworn in its behalf one Joseph W. Wallish, who testified substantially as follows:

JOSEPH W. WALLISH.

I am acquainted with the plaintiff and have known it since 1885. I know where the ground in controversy in this case is located. I have heard the testimony of Mr. Parks and heard him speak of taking certain samples. I was present when those samples were taken. The first sample was taken in the Montana company's apex shaft, it was taken from the northeasterly portion of the shaft. We spread a small canvas down on the floor and Professor Parks took his pole pick and ran it across the solid matter there. Then the portion that fell down was divided into two sacks, and Professor Parks handed the delegation of the Montana company one
67 of them. There were present, Professor Parks, William Jenkins and myself representing the St. Louis company, and

on the part of the Montana company there was William Philpotts, Mr. Thomas Lahiff, Mr. Bob Matthews and Mr. Dave Heron. The same method was followed in the entire sampling; that is, so far as the disposition of the samples taken was concerned.

Cross-examination:

I took care of the samples. It took one day to do the sampling. The first sample was taken 12 or 15 feet down the Montana company's apex shaft from the surface. The next one was taken between 40 and 55 feet, it was also taken from the north side of the shaft. The third sample was taken about 10 feet further down, or in other words about 65 or 70 feet from the surface. It was taken on the north side in the cribbed shaft. The fourth sample was taken about the center of the cribbed shaft. Professor Parks was the only one in the main portion of the shaft, the balance of us later on went down the manway, and we could look into the main shaft and saw him operating. This sample was taken probably 85 to 90 feet from the top of the cribbed shaft. The fifth sample was taken about 12 feet or 15 feet from the bottom of the cribbed shaft, which would be about 115 or 120 feet, something like that, from the surface. The next place that a sample was taken was in the 85-foot level. We had gone up their raise. A canvas was spread down at the breast of the 85-foot
68 level and samples taken. There was a portion of two ore sacks divided up between us, one to us and one to them. They were larger than the usual size.

The plaintiff recalled John R. Parks, who testified substantially as follows:

JOHN R. PARKS.

The discovery vein of the St. Louis is a gold-bearing fissure vein running in the general direction of the side lines. The vein is developed both northerly and southerly from the Transcontinental tunnel. There are levels running on the vein about 250 feet below the Transcontinental tunnel. It has a dip of about 80° to the east. The Transcontinental tunnel follows a fissure, and there is a fault of the lode caused by that fissure which causes a throw of the vein of about 95 feet.

The Drumlummon vein crosses the east boundary of the St. Louis at the 520 plane. I cannot place the foot-wall at the present; it is not shown on the map, and I have forgotten the exact point. I believe the cut developed it, but I cannot recollect the exact point. Going southerly along the 85-foot level we are just under the hanging-wall of the Drumlummon and in the bratticed vein matter until we come to cut No. 14. At cut No. 14 we have a section across the whole vein which can readily be determined on the hill. The walls of the Drumlummon go down at an angle of about 60°. There is a cross-cut at point 4 on the 85-foot level showing the vein at
69 that point to be about 21 feet wide. The hanging-wall departs at the 108-foot plane from the St. Louis ground and into the compromise ground.

Whereupon the witness was asked the following question:

Q. Have you done anything in the way of measuring up what was taken out by the Montana company?

Whereupon the defendant objected to any testimony relative to ores extracted between the 108 and the 133-foot planes. Defendant argued in support of its objection that between said points the plaintiff did not have the entire apex, that if granted extralaterial rights between said points, it would be taking the ore from the vein on its strike and beyond the vertical side line of the plaintiff's ground, and for the reason that it would take about 186 square feet of the surface of defendant's claim.

But the Court overruled said objection and permitted the witness to answer said question.

To which ruling of the Court the defendant then and there duly excepted.

A. I have, Mr. Keerly and myself made a careful survey of the ground and accurately measured all of the stopes and cavities from which ore had been removed. I sampled carefully in the presence of people appointed by the Montana company to go with me. I took samples of all these stopes. After taking the samples I tendered to them a choice of either portion, and they were received by
70 them. I have assayed those samples carefully in duplicate and I have determined the specific gravity of the mineral removed by taking specimens of that removed at the nearest point; a great number of specimens, calculated the number of tons, the number of cubic feet it takes to make a ton, and from the tonnage and the values I have determined with a considerable degree of accuracy, as correctly as can be determined, the tonnage and the value of the ore extracted. I arrived at the value by samples of ore taken at the nearest points to the cavities stoped out, knowing that the ore originally followed these cavities, and assaying the samples. I calculated the value of the gold at twenty dollars an ounce, which is the rate paid by the smelters, the true value being $2.67 as paid by the Government, and I took the value for the silver at sixty cents an ounce, which was the average price of silver during that time. In making the survey I was obliged to make an arbitrary division of some of the stopes for the reason that we could not determine how much of the ground we would be allowed to show damages for, and consequently in some of the stoped ground I passed an imaginary plane through the stopes, the 108-foot plane, and then divided the balance up with reference to the east and the west side lines of the compromise ground. I called the results of this arbitrary division blocks, which are numbered as we happened to survey and block them out.

71 We followed the plan-s as far south as the 133-foot plane and to the depth of the 190-foot level in defendant's ground. I divided the ground into eleven blocks.

Whereupon the witness was required to take the blocks and tell the tonnage and value he found in each block.

To which said question the defendant objected for the reason that

it included blocks in the compromise ground which by the judgment in the specific performance case was found to be the property of the defendant, together with all of the mineral therein contained. And because they are not within the recovery period under the pleadings in this action, in that a portion thereof at least is taken out since September 16th, 1893. Defendant also specially objected to all proof of quantities and values of any and all ores in each block respectively lying between the 108 and 133-foot planes and south of the Montana company's apex shaft, because no recovery for any ore there extracted is permissible under the pleadings in this case.

But the Court overruled each and every such objection and permitted the witness to answer said questions.

To which respective rulings of the Court the defendant then and there duly excepted.

The witness answered:

A. I have a block No. 1, the stope south of the north line of the Montana company's apex shaft to the 133-foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the compromise ground extended downward vertically.

72 The block has an average width of 7 feet, is 21 feet long and 36 feet high, giving a volume of 5333.1 cubic feet, or 410½ tons. The average value of this ore was $145.00 per ton, or a total of $59,522.50.

Block number 2 is the stope between the instrument at K. and the spud at J. J was 13.5 feet vertically below K. It is from the north side of the Montana company's apex shaft south to the 133-foot plane. The average width of the block is 5.4 feet, its height is 3½ feet, and its length 21 feet, giving a cubical contents of 1814.4 cubic feet. Dividing that by 13, the number of cubic feet to the ton, we have 139.6 tons. The value of the ore as sampled on the north side of this block was $146.42 per ton, which gives the value of the ore removed $20,440.23.

The next block, number 3, is the ore removed between stations J to the floor at H between the 108 and the 133-foot planes, and east of the west of the side line of the 30-foot strip. The height is 66.9 feet, the ground removed is 5 x 7 feet, which gives 2341½ cubic feet or 180.1 tons. The value of the ore from the side of the shaft throughout this distance is $203.88 per ton, making a total value of the ore removed $36,718.78.

Block number 4 is the stope above the 20-foot level, east of the west line of the 30-foot strip. It is south of the 108-foot plane and north of the Montana company's apex shaft.

By agreement of counsel the objections interposed and the

73 exception taken with reference to block one was to extend to blocks two and three and all subsequent blocks in the Compromise ground.

Block 4 is 6 feet wide, 14 feet high, and 6 feet long. It contains 514 cubic feet, or 38.8 tons. A sample of the ore was taken from the shaft, which gave $165.10 per ton, making a value of $6,405.88.

Block 5 is a stope along the 190-foot level, between the 108 and the

133-foot planes east of the west line of the 30-foot strip. It has an average width of 8.4 feet wide, is 8 feet high, and 36 feet long, giving a cubical contents of 2419.2 cubic feet or 186.1 tons. The value of the ore was $127.14. Total value of the ore removed was $23,660.75.

Block 6 is a triangular stope above the 190-foot level between the 108 and the 133-foot planes and east of the west side line of the strip. The length of the stope is 26 feet, average height, 71 feet, average width stoped out, 8 feet. It has a cubical contents of 7753.2 cubic feet or 596.4 tons. The value at $127.14 per ton is $75,826.30.

Block 7 is a little stope which connects the main stope of the 190-foot level with the 40-foot level between the 108 and the 133-foot planes, and east of the west side line of the 30-foot strip. It has an average width of 8.4 feet. Its cubical contents is 2356.2 feet or 181.2 tons, at a value of 127.14; total value of the ore removed is $23,037.77.

Block 8 is the ground stoped out by the Montana company at the south end of the St. Louis' 85-foot level. It is outlined on the
74 map and lies east of the west side line of the compromise strip, and north of the 108-foot plane. This is the ore that was stoped by injunction. The average height of this stope is 15.3 feet, the average width is 6.5 feet, the average height is 22 feet. It contains 2187.9 cubic feet, or 168.3 tons. The value of the ore is $13.28 per ton, total value of the ore removed, $2,235.02. I have excluded a portion of this block as the ore was too low grade.

Block 9 is the stope above the 20-foot level and north of the 108-foot plane. That stope was 6 feet wide, 14 feet high, and 9.5 feet long. It contains 798 cubic feet or 61.4 tons. It has a value of 165.10 per ton, same as block number 4, of a total value of $10,137.14.

Block 10 is on the 190-foot level north of the 108-foot plane. That block has a width of 8 feet and a length of 35 feet and a height of 8 feet. It contains 1904 cubic feet, or 146.5 tons. The value of the ore is $127.14 per ton; giving a gross value of $18,626.01.

I find the total number of cubic feet mined is 27,414.5 or 2118.9 tons, the total value of which is $276,610.38.

Cross-examination:

I took samples from the north side of the Montana company's apex shaft, and I combined the samples from four different points. The shaft is about five feet by seven feet, the long way being northerly and southerly. The samples were taken between the lagging and the shaft, except for block 8; in that case a wagon sheet was spread
75 down and a sample was taken from the top of the block and from its sides. The sample I took in block 2 assayed $146.42. I took it by reaching in between the lagging. My samples for blocks 5, 6, 7 and 10 combined samples taken from the north side of the Montana company's apex shaft. The combined sample averaged $127.14. I took no sample nor made any assay from blocks 5, 6, 7 and 10 for the reason that the ore had been stoped out of the blocks, when my samples were taken. These four blocks, 5, 6, 7 and 10, I estimated to be of the value of $141,150.83. In making my aver-

age, I took the value of block 1, $145.00; block 2, $146.42; block 3, $203.88; block 8 $13.28.

Redirect:

There is a block of ground between the 108 and 133-foot planes and above the 190-foot level that is not included in the stopes or blocks which I surveyed and about which I have testified. The superficial area of such block is 1855½ square feet. Assuming that the ground contained an ore body of an average thickness of 7.29 feet the cubical contents of that ore would be 13,526.63 cubic feet.

Q. And how many tons at 13 per ton?

By Mr. WALLACE: What is the purpose of that?

By Mr. BROWN: We want to show what is in it. It might not be redirect, but I want to put it in any way. It was brought out by them.

By Mr. WALLACE: We object to the question, first: Because
76 it assumes a fact not in evidence, that the area in question contained ore. Second, on the ground that it is immaterial and irrelevant in that the tonnage of this area can cut no figure, since there is no place that embraces any part of stoped territory.

Objection overruled.

Defendant excepts.

A. This would represent 1040.51 tons, taking 13 cubic feet for a ton. Calculating the value of the ore at $127.14, the ore body would have a value of $132,290.44. The average thickness measured horizontally of the ore bodies in the surrounding blocks is 7.29 feet.

Thereupon the plaintiff offered in evidence the original location notice of the St. Louis claim, which was admitted and is as follows, to wit:

Declaratory Statement of Discovery of and Claim to Quartz Lode Mining Claim.

St. Louis Lode Mining Claim, Ottawa Mining (Claim) District, Lewis and Clarke County, Montana Territory:

The undersigned, who is a citizen of the United States, hereby declares and gives notice to all persons concerned, that he has discovered a vein or lode within the limits of the claim hereby located, and that he has this 28th day of September, A. D. 1878, located and do- hereby locate and claim under and by virtue of the laws of the United States and of the Territory of Montana, a mining claim upon said lode or vein to be designated and named the St. Louis Quartz Lode Mining Claim, extending along said vein or lode eight
77 hundred feet in a northeasterly direction, and seven hundred feet in a southwesterly direction, from the center of discovery shaft, where a similar notice is posted, and three hundred feet on each side from the middle or center of the said lode or vein at the surface, comprising in all fifteen hundred feet in length along said lode or vein, and six hundred feet in width, with all the rights and

privileges as to surface ground and lode veins, or lodes within the boundaries of said claim and otherwise and the metals, minerals, and valuable deposits of every kind contained in said veins, lodes or ledges, or within said boundaries which are given or allowed by the laws of the United States aforesaid or of the Territory of Montana.

The mining claim hereby located is situated in Ottawa mining district, Lewis and Clarke County, Montana Territory. Said discovery shaft is about 900 feet in a southwesterly direction from a point of rocks rising about 15 feet above ground and upon the southwestern portion of the Drumlummon mining claim, and about 1,500 feet easterly of Ottawa Gulch in above written county and territory. The adjoining claim is the Drumlummon on the northeast. This location is distinctly marked on the ground so that its boundaries can be readily tracted by a stake set at discovery shaft this 28th day of September, A. D. 1878. And by substantial posts at each corner of the claim and the exterior boundaries of the claim as marked by said posts are as follows, to wit:

Beginning at a post set at discovery shaft, marked A, thence running in a northeasterly direction eight hundred feet to a post
78 marked B, thence northwesterly 300 feet to a post marked D, thence southwesterly 1,500 feet to a post marked E, thence southeasterly three hundred feet to a post marked F, thence same course three hundred feet to a post marked G, thence northeasterly 1,500 feet to a post marked C, thence three hundred feet northwesterly to post B. The undersigned intend- to hold this claim under and according to the laws of the United States and of the Territory of Montana, and to record this notice and statement under oath in the County Recorder's office of said county, as provided by law. Dated this twenty-eighth day of September A. D. 1878.

CHARLES MAYGER. [SEAL.]

TERRITORY OF MONTANA, *Deer Lodge County, ss:*

The undersigned being first duly sworn on oath says that he is of lawful age, a citizen of the United States; that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated and that the matters in the foregoing notice contained are true of his own knowledge.

CHARLES MAYGER.

Subscribed and sworn to before me on this, the 10th day of October, A. D. 1878.

J. B. WILCOX,
Justice of the Peace.

79 Filed for record, October 12, 1878, at 9 o'cl'k, A. M.

O. B. TOTTEN,
County Recorder.

St. Louis Patent.

The plaintiff thereupon offered in evidence its patent for the St. Louis Mining Claim, which was received in evidence, and marked as an exhibit, said patent is dated on the 22d day of July, 1887, and conveys the said St. Louis claim to plaintiff's grantor, Charles Mayger, describing the said claim by metes and bounds as in the complaint herein, which patent, among other things, contains the following proviso, to wit:

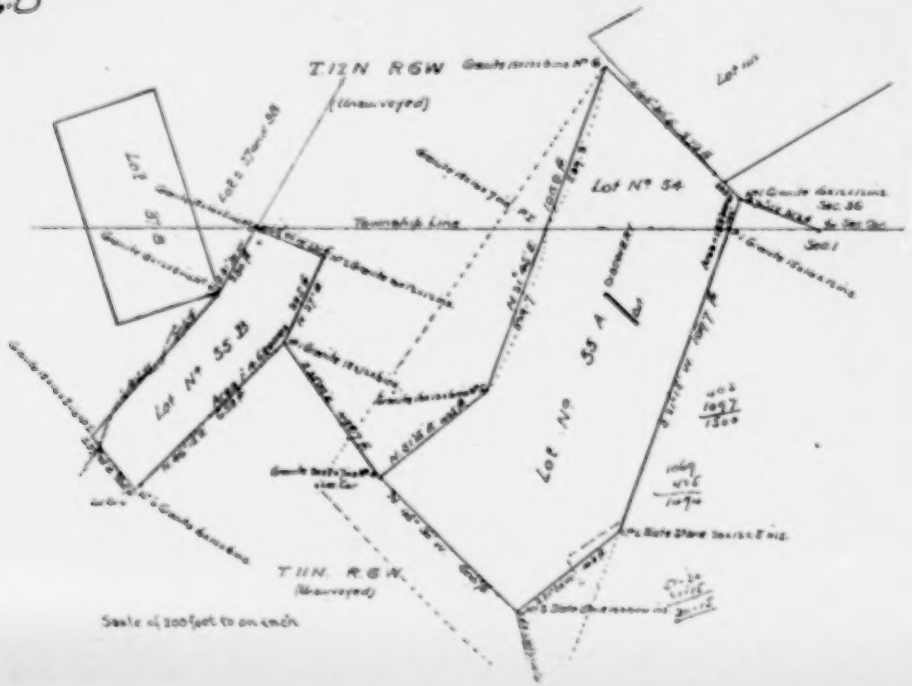
"Provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lots Nos. 54 and 55 A, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; and, provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another."

Whereupon it is ordered by the Court that the patent itself be ordered attached to this bill of exceptions and sent up to the Circuit Court of Appeals as part of this record, in accordance with the rules of court.

The said patent was dated on the 22d day of July, 1887, and contained the diagram of the St. Louis Lode Mining Claim as therein conveyed, which said diagram is herein reproduced as follows:

(Here follows diagram marked p. 80.)

No. 402
Montana Co. } p. 80
St. Louis Co.



81 *Judgment-roll in Specific Performance Case.*

The plaintiff then read in evidence the complaint, the answer, the replication, the findings of fact and conclusions of law and the judgment rendered in the case of the Montana Mining Company, Limited, *vs.* The St. Louis Mining and Milling Company of Montana, as the same appeared of record in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis and Clarke, and commonly known as the Specific Performance case. Said documents, omitting captions and titles, are as follows, to wit:

In the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis and Clarke.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
CHARLES MAYGER and THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant-.

Complaint.

The plaintiff complains of the above-named defendants and for cause of action alleges.

82 I.

That this plaintiff is an incorporation duly organized and existing by and under the laws of the Kingdom of Great Britain, and is doing and entitled to do business in the State of Montana by virtue of its compliance with the laws of this State regulating foreign corporations.

That the above-named defendant, the St. Louis Mining and Milling Company of Montana, is and was at the several dates hereinafter mentioned likewise an incorporation organized and existing by and under the laws of said State of Montana.

II.

And plaintiff further shows and alleges that on and prior to the 7th day of March A. D., 1884, plaintiff's predecessors in interest, to wit, one William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy, who were then and there all citizens of the United States and duly qualified mineral land claimants, were the owners of, in possession of, and lawfully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground, comprising a portion of the Nine Hour Lode Mining Claim situate, lying and being in Ottawa (unorganized) Mining District, in the County of Lewis and Clarke, and State of Montana, more particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour Lode bears south 39 degrees 32 minutes
83 east, said course being at right angles to the boundary line of the St. Louis Lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east, on a line parallel to the aforesaid boundary line of the St. Louis Lode Claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode Claim between corners one and two; thence 20 degrees and 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 408 feet to corner No. 3 of the St. Louis Lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis Lode Claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode Claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained; that theretofore in causing to be surveyed for a patent his St. Louis Lode Mining Claim, the above-named defendant Charles Mayger, had wrongfully extended, and caused to be extended, the easterly boundary line of his said mining claim over the premises so above-mentioned and particularly described, which said premises were then, and ever since the twenty-sixth day of July, 1880, have been, a part of the Nine Hour Lode Mining Claim, so that the property of the aforesaid predecessors in interest of this plaintiff, and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual
84 possession and entitled to the possession thereof. And thereupon said defendant Charles Mayger, having wrongfully made application in the United States Land Office at Helena, Montana, to enter said premises as a part and portion of his said St. Louis Mining Claim, the said Robinson and Huggins duly made and filed in said land office a protest and adverse claim thereto, and thereafter and within the time allowed by law for such purpose, they commenced an action in the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis and Clarke, to determine the right to the possession of the said premises. In the said action so commenced as aforesaid, the said William Robinson and James Huggins were plaintiffs, and the above-named defendant, Charles Mayger, was defendant therein, and the said court had jurisdiction to determine the subject matter of said action; that thereupon, and on the seventh day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode Mining Claim and the said St. Louis Lode Mining Claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing, whereby, in consideration of the compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim in the said land office, so that he might procure a United States patent, he thereby covenanted and agreed

that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling, or
85 their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns, a good and sufficient deed of and for all the premises so above particularly mentioned and described, a copy of which said bond for a deed is hereunto annexed marked Exhibit "A" and hereby made a part of this complaint.

III.

And plaintiff further shows and states that thereupon the said Robinson and Huggins dismissed their said suit in said District Court, withdrew their said adverse claim in said land office, and duly performed on their part all of the terms and conditions of said contract to be by them kept and performed, that the said Charles Mayger thereupon proceeded with his application to enter said St. Louis Lode Mining Claim, and thereafter a United States patent was duly issued to him for said St. Louis Lode Mining Claim as surveyed, and included therein that portion of the Nine Hour Lode Mining Claim above particularly mentioned and described, but no notice was given to this plaintiff or any of its predecessors in interest of the issuance of said patent, until on or about the — day of November, 1899. That upon the execution of said bond for a deed the said predecessors in interest of this plaintiff were in possession of the premises above mentioned and described, and they and their successors in interest ever since have been and yet are in the possession thereof, holding, using and enjoying the same as a part and portion of said Nine Hour Lode Mining Claim.

86 IV.

And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode Mining Claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode Mining Claim; that being so the owner of said mining claim, and being so entitled to a conveyance of the portion thereof above particularly mentioned and described, this plaintiff, on or about the — day of July, A. D. 1893, demanded of and from the said defendants that they make, execute and deliver a good and sufficient deed to it of and for the premises above mentioned and described in compliance with the terms and conditions of the said bond, no demand for the execution of said deed having been previously made by plaintiff or any of its predecessors in interest; but the said defendants then and there refused and ever since have neglected and refused to make, execute or deliver said deed, though often requested so to do.

V.

And plaintiff further shows and states that not only has the said defendant, Charles Mayger, refused and declined to comply

with the reasonable request of the plaintiff that he make and execute to it a deed for the said premises above particularly described, as in and by his said bond for a deed he covenanted and agreed to do, but on or about the tenth day of June, A. D. 1893,
87 for an alleged consideration of one thousand dollars, he made, executed and delivered a deed of and for said premises to the said defendant, the St. Louis Mining and Milling Company of Montana, but plaintiff avers that at the date of the execution of said deed, the said defendant, the St. Louis Mining and Milling Company of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said co-defendant and of the rights and equities of plaintiff thereunder as being the successors in interest of the said Robinson, Huggins, Sterling and its other grantors.

And plaintiff further alleges that the said defendants have conspired and confederated together for the purpose of cheating, wronging and defrauding this plaintiff out of the said premises, and to that end the said defendant and the St. Louis Mining and Milling Company of Montana have instituted a number of suits in the Circuit Court of the United States within and for the District of Montana, in which it claims that it is the owner of the premises above particularly described by virtue of the deed so wrongfully and fraudulently made, executed and delivered to it by its said codefendant, as aforesaid, and in which said actions it claims the right to recover large sums of money for ores therein alleged to have been wrongfully mined from said premises by this plaintiff; that in order to successfully defend itself against said suits and in order to remove the cloud from plaintiff's title to said premises caused by the execution of the said deed to the said defendants, the St. Louis Mining and Milling Company of Montana, it is necessary
88 that the said defendants should be compelled to make, execute and deliver to this plaintiff a deed for the said premises, as in equity and good conscience they ought to do.

Wherefore, the premises considered, plaintiff prays that by the proper order or decree of this Court the said defendants be adjudged and decreed to make, execute, and deliver to plaintiff a good and sufficient deed for the said premises above mentioned and described, and that in the event of their failure so to do the decree of this Honorable Court may have the force and effect of such deed; that plaintiff may have such other and further relief as may be in accordance with equity and good conscience, and that it have judgment for its costs.

M. KIRKPATRICK AND
CULLEN & TOOLE,
Plaintiff's Attorneys.

Duly verified by Jos. K. Toole, as attorney, on September 5th, 1894, before W. E. Cullen, Jr., notary public, Lewis and Clarke County, Montana.

EXHIBIT "A."

Deed—Mayger to Robinson et al.

Know all men by these presents, that I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars, for the payment of which well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with my seal and dated this 7th day of March, A. D. 1884.

89 The consideration of this obligation is such that, whereas, a certain cause now pending in the District Court of the Third Judicial District, Lewis and Clarke County, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States Land Office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar to the said Charles Mayger in hand paid by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in the United States Land Office at Helena, Montana, for a patent to the St. Louis Lode Claim described therein and situated in Lewis and Clarke County, Montana Territory, and procure as soon as practicable a government patent therefor, and when such title shall have been procured according to said application said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situated in Lewis & Clarke County, Montana Territory, and comprising a part of two certain quartz lode mining claims known

90 as the St. Louis Lode Claim and the Nine Hour Lode Claim, and particularly described as follows, to wit: Commencing at a point from which the center of the discovery shaft of the Nine Hour Lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis Lode, between corners 2 and 3, 50 feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the said St. Louis Lode Claim and the Nine Hour Lode Claim, and to a point on the boundary line of the St. Louis Lode, between corners 1 and 2; thence south 20 degrees 28 minutes east along said boundary line between corners 1 and 2, 605 feet to corner No. 2 of the St. Louis Lode, 40.031 feet to corner No. 3 of the St. Louis Lode; thence north

46 degrees 10 minutes west along the line of boundary of St. Louis Lode, between corners 3 and 4, 30 feet to a point; then north 50 degrees 28 minutes east along the line parallel to the boundary line of the St. Louis Lode, between corners 2 and 3, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral therein contained; and if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void; otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL.]

91 The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

Duly acknowledged. Filed and recorded March 8th, 1884, at 3 A. M.

[Title of Court, Title of Cause.]

Answer.

And now come the defendants herein and for answer to the complaint of plaintiff:

I.

Admit that the said William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy were at the time mentioned in said complaint citizens of the United States and duly qualified mineral claimants, but on their information and belief deny that they were or are the predecessors in interest of said plaintiff, or that they were the owners or possessors of the piece, tract or parcel of land in said complaint described, or in the possession or entitled to the possession thereof, or any mineral therein then or at any other time, or that the same was or is a part of the Nine Hour Lode Claim, and aver that the same was and is a part of the St. Louis Lode Mining Claim, designated and known as such, and embraced and included in the United States patent obtained by the said defendant, Charles Mayger, for said St. Louis Lode Mining Claim, as hereinafter set forth.

92 Deny that defendant, Charles Mayger, wrongfully or otherwise extended or caused to be extended the easterly boundary line of said St. Louis Mining Claim, over the said described premises or any part thereof, but admit that he caused a survey to be made of the same, and aver that the boundary lines of said St. Louis Mining Claim as originally located included and embraced the said

locus in quo and every part thereof at and prior to the location of said Nine Hour Lode Claim, and that the said Charles Mayger and his successors in interest ha*th* ever since been, and now are, in the possession of the same and entitled thereto, save and except a small strip thereof occupied by a portion of the ore-house of plaintiff by sufferance of defendants.

And on their information and belief deny that said Charles Mayger wrongfully made application in the United States Land Office to enter said premises, and aver that the same was and at all times had been a part and portion of the said St. Louis Mining Claim.

Admit that the adverse claim of Robinson and Huggins was interposed to said application, and that they instituted an action, as in said complaint mentioned, and that said agreement was entered into, but deny that it was for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode Mining Claim and said St. Louis Lode Mining Claim, and aver that the same was executed to the said Robinson, Huggins and Sterling as a compromise on account of their adverse claim and suit aforesaid, and comprised a part of said St. Louis Lode Claim
93 owned and possessed by the said Charles Mayger, and to enable him to obtain a patent for the whole thereof according to said survey, and agreed to convey the same as in said bond set forth.

Defendants admit that by the terms of said bond the said Charles Mayger agreed, after obtaining a patent therefor, on demand of said Robinson, Huggins and Sterling, to make to them, their heirs or assigns, a good and sufficient deed for the premises in said complaint described, and on their information and belief aver that said plaintiff never has acquired or succeeded to the right, title or interest of said Robinson, Huggins or Sterling to said premises or any thereof, by conveyance or otherwise.

Deny that said Exhibit "A," as set forth, is a copy of the said bond, in that it obligates the said Charles Mayger to make a good and sufficient deed to said Robinson alone, and avers the fact to be the said original bond obligated said Charles Mayger to execute a deed on demand to the said Robinson, Huggins and Sterling, their heirs or assigns, as expressly set forth and alleged in said complaint.

II.

Admit that the said Charles Mayger obtained a patent for said St. Louis Lode Mining Claim, but deny that it contained any portion of said Nine Hour Lode Mining Claim, and aver that the said plaintiff and predecessors in interest had full knowledge and notice of the issuance of said patent mentioned, and were well aware and apprised thereof at or about the date of the issuance of the same.

94 Deny that at the time of the execution of the said bond, or at any other time, the said plaintiff or its predecessors in interest were, or ever have been, in possession of said premises, or any part thereof, except the small portion aforesaid, or that they

or either of them used or enjoyed the same, or any part except the small part aforesaid, or that they ever had, held or enjoyed any part thereof as a part of said Nine Hour Lode Mining Claim.

III.

Admit that the said plaintiff, by mesne conveyances, acquired the title to said Nine Hour Lode Mining Claim, but deny that the said conveyances or any conveyances to plaintiff embraced or included the premises in said complaint mentioned and described, or any part or portion thereof.

Admit that the said plaintiff demanded of defendants a deed to said premises, as set forth in said complaint, but deny that no demand therefor was ever theretofore made, and aver the facts to be as hereinafter stated.

IV.

Deny that the said defendants, or either of them, had any knowledge or notice that the said plaintiff was the successor in interest of said Robinson, Huggins and Sterling, or either of them at the time of the making of the deed by the said defendant Mayger to his said codefendant, and on their information and belief deny that the said plaintiff is the successor in interest of said Robinson,
95 Huggins and Sterling, or either of them, in said premises so embraced in said Mayger's survey and patent, or any part thereof.

Deny that defendants have combined or confederated together for the purpose of cheating, wronging, or defrauding plaintiff out of its right or title to said premises or any part thereof, and aver, as heretofore, that the plaintiff has not and never had any right or title to said premises, or any part thereof, as successor in interest to any one whomsoever.

Deny that the claim of defendants, or either of them, casts any cloud upon any title of plaintiff, or that it is necessary they, or either of them, should execute a deed to plaintiff for said premises, or any part thereof, to satisfy the requirements of equity, or for any other cause or reason, and aver that if the said conveyances to plaintiff for said Nine Hour Lode Mining Claim included said premises as alleged no such transfer or conveyance is necessary for any purpose.

And these defendants, for further answer to the complaint of plaintiff, show unto this Honorable Court that the said adverse claim aforesaid was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to said St. Louis Mining Claim, and that the said bond was executed as a compromise to avoid the same; all of which was done contrary to equity and good conscience, and for the sole purpose aforesaid.

That on the twenty-second day of July, 1887, the said Charles Mayger, grantor of his codefendant, obtained and procured a United States patent for the premises described in his complaint as a
96 part and portion of his St. Louis Mining Claim in accordance with his possession and the survey had thereof, on account

of which he acquired the legal title thereto, and had and held the possession thereof.

That the said defendant, the St. Louis Mining and Milling Company of Montana, ascertaining and learning that the said conveyances to said plaintiff did not comprise the said premises described in plaintiff's complaint, and that it had and held no title thereto, and for the purposes of better securing the possessory title by it had and held, obtained and received the deed from said Charles Mayger mentioned and described in plaintiff's complaint.

And these defendants, for further answer to the complaint of the plaintiff, and in pursuance of section 105, Code of Civil Procedure, Compiled Statutes of Montana, allege generally that the cause of action set forth in plaintiff's complaint is barred by the provisions of sections 29, 30, 31 and 32, subsec. 2, section 41 and section 47 of said Code of Civil Procedure, and had been so barred at the time of the execution of said deed to said defendant company.

Wherefore, defendants pray this Hon[illegible] Court that if it shall appear the said plaintiff is not the ov[illegible]id premises by any of the conveyances mentioned in the s[illegible]plaint, or the title by it so pleaded, that the same be decreed [illegible]nd void, and that the right, title and claim of defendant company be decreed superior to the claim of plaintiff in the premises in controversy; that such other and further relief may be had as in equity and good conscience
97 they or either of them may seem entitled, and that they receive their costs and disbursements in this behalf expended.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

Duly verified.
Filed January 2, 1895.

[Title of Court. Title of Cause.]

Replication.

Now comes the plaintiff, and replying to the new matter in the answer of defendants filed herein:

I. Denies that the premises particularly mentioned and described in the complaint herein are or ever were any part of the St. Louis Mining Claim in any other way or manner or at all, except that the same were by the agreement aforesaid to be embraced in the application of the said Charles Mayger for a patent, as in the complaint herein mentioned and set forth.

II. Denies that the boundary lines of the St. Louis Mining Claim as originally located included or embraced the *locus in quo* or any part or portion thereof, and denies that the said Charles Mayger or his successors in interest are now or have ever been in the possession of the same or entitled thereto or any part or portion thereof.

III. Denies that the said original bond obligated the said Charles

Mayger to execute a deed on demand to the said Robinson,
98 Huggins and Sterling, but, on the contrary, avers that the copy of said bond attached to the complaint herein is a true copy thereof.

IV. Denies that the said adverse claim mentioned in the complaint herein was interposed for the purpose of harassing or delaying the said Mayger from obtaining a patent to his said St. Louis Lode Mining Claim, and denies that there was anything in or about the execution and delivery of the said bond contrary to equity or good conscience.

V. Plaintiff denies that the said defendant, the St. Louis Mining and Milling Company of Montana, ever had or held a possessory title to the premises in the complaint herein particularly mentioned and described, or that it obtained or received a deed from said Charles Mayger for the better securing of any such title.

VI. Denies that the cause of action set forth in plaintiff's complaint is barred by the provisions of secs. 29, 30, 31, and 32, subsec. 2, sec. 41 and sec. 47 of the Code of Civil Procedure of the State of Montana, or any or either thereof or at all.

Wherefore plaintiff prays judgment as in its complaint herein.

M. KIRKPATRICK,
CULLEN & TOOLE,
Attorneys for Plaintiff.

Duly verified.

99 *Findings of Fact by the Court.*

I.

That the plaintiff and the defendant, the St. Louis Mining and Milling Company of Montana, are and each of them were, at the date of the commencement of this action, corporations doing business in the State of Montana.

II.

That on the seventh day of March, A. D. 1884, William Robinson, James Huggins, F. P. Sterling, Warren De Camp and John W. Eddy were the owners of, in possession and entitled to the possession of all and singular the Nine Hour Lode Mining Claim, situate, lying and being in the Ottawa (unorganized) Mining District, in the county of Lewis & Clarke, State of Montana, and that the strip of ground called the "compromise ground" which is the subject of dispute in this action, was, at that time, and thereafter continued to be, a part of said Nine Hour Lode Mining Claim.

III.

That prior to the date last aforesaid the said Charles F. Mayger had made application in the United States Land Office at Helena, Montana, for a patent to the said St. Louis Lode Mining Claim, and had included in his application the said ground which is the subject of dispute in this action, and that thereupon the said Robinson and

Huggins had made and filed in the said land office a protest and adverse claim to the ground in dispute, and an action had
100 been instituted within the statutory time to determine the right to the possession of said premises in dispute, and as to who had the right to obtain patent therefor; which said action at said last aforesaid date was pending in the District Court of the Third Judicial District of Montana, within and for the County of Lewis & Clarke; that on the said seventh day of March, A. D. 1884; the said Robinson, Huggins and Sterling and the defendant, Charles F. Mayger, entered into the bond or obligation attached to the complaint herein, marked exhibit "A," and that said obligation or bond was made and given for the purpose of settling and determining the action aforesaid and the controversies involved therein, and for the purpose of determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim owned by the said Mayger, the boundaries of which claims were in conflict aforesaid.

IV.

That thereupon said suit was dismissed and the said adverse claim was withdrawn in said land office, the said Robinson, Huggins and Sterling performing on their part all of the terms and conditions of said contract to be by them performed.

V.

That at the date of the execution of the said bond, the said Robinson, Huggins and Sterling, Eddy and De Camp were in the
101 actual possession of the said compromise strip, and that they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of their said Nine Hour Lode Mining Claim.

VI.

That at the date of the execution and delivery of said bond it was expressly agreed between the parties hereto that all of the ground lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour Lode Mining Claim.

VII.

That the plaintiff herein is the successor in interest of the said Robinson, Huggins and Sterling, the obligators named in said bond, and it is also the successor in interest of Warren De Camp and John W. Eddy, who were cotenants with said obligees in said premises at the date of the execution of said bond.

VIII.

That the conveyances introduced in evidence on the part of the plaintiff embrace and were intended to include the said compromise ground, and conveyed to the respective grantees therein named all

the interest, legal and equitable, which the said grantor or grantors had in said premises at the date of the execution thereof, and it was the intention of the parties to the deeds to convey as well their interests in said compromise strip as every other part and parcel of the said Nine Hour Lode Mining Claim.

102 IX.

That on or about the — day of July, A. D. 1893, the said plaintiff, as the assignee of the said Robinson, Huggins and Sterling, duly demanded a deed of said compromise strip of ground of and from said defendant, but the said defendant refused to execute such deed, and that no demand for such deed had ever previously been made upon the said Charles F. Mayger by the said plaintiff or any of its predecessors in interest.

X.

That on or about the tenth day of June, A. D. 1893, the defendant, Charles F. Mayger, assumed to convey the said compromise strip to his codefendant, the St. Louis Mining and Milling Company of Montana, but at the date of said conveyance, the said defendant, the St. Louis Mining and Milling Company of Montana, had full notice and knowledge of the equities of the plaintiff in and to said compromise strip and its possession thereof.

XI.

That the defendants wrongfully assert title to the ground in controversy, and thereby cloud the title and estate of plaintiff therein, and that plaintiff has a right to have such cloud removed from its title to the premises in controversy.

XII.

That the Court finds all of the issues raised by the pleadings in this case in favor of the plaintiff and against the defendants.

103 *Conclusions of Law.*

I.

The plaintiff is entitled to a conveyance from the said defendant of and for the premises particularly mentioned and described in the said bond, known as the "compromise ground."

II.

That the said defendants, and each of them, should be enjoined and perpetually restrained from asserting any right, title, or interest of any kind or character in or to the said compromise ground, or any part or portion thereof, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

Dated June 1, 1895.

HORACE R. BUCK, *Judge.*

[Title of Court, Title of Cause.]

Judgment.

This cause came regularly on to be tried on the tenth day of May, A. D. 1895, Charles J. Hughes, Jr., Mr. Kirkpatrick, and Cullen & Toole appearing for the plaintiff, and Messrs. W. W. Dixon, Toole & Wallace and McConnell, Clayberg & Gunn, appearing for the defendants. A jury having been expressly waived by the parties the issues raised by the pleadings herein were tried to the court sitting without a jury, and after the introduction of testimony on the part of the plaintiff and on the part of the said defendants, and the
104 argument of counsel, and after due deliberation, the Court having made and filed on the first day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner of the equitable and entitled to the conveyance from the defendants of the legal title to the premises mentioned in the complaint and hereinafter described.

Now, therefore, on motion of counsel for plaintiff, it is ordered, adjudged and decreed that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, be specifically performed, and that the defendant the St. Louis Mining and Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to the said plaintiff a good and sufficient conveyance in fee simple absolute, free from all encumbrances, of and for the premises mentioned in the complaint and hereinafter described. The said conveyance shall be in form like the one hereunto annexed, and, upon the failure of said defendant within the time aforesaid so to make, execute, and deliver such conveyance, then the clerk of this court is hereby appointed a commissioner, who, in the name of and for and on behalf of the said defendant, the St. Louis Mining and Milling Company of Montana, is hereby directed to execute a deed to said plaintiff for said premises, which, after reciting that it is so executed by said clerk as such commissioner for and on behalf of said defendant, shall be in form substantially like the one hereto attached and approved, and,
105 upon recording a duly certified copy of this decree, and of the said deed so executed by the said commissioner, in the office of the county recorder of the county of Lewis and Clarke, and State of Montana, the same shall have the force and effect of a conveyance of the said title from the said defendants to the said plaintiff; that the said defendants and all persons claiming under them or either of them be forever barred from all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any thereof.

The premises affected by this decree and so to be conveyed are more specifically bounded and described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour Lode bears south 39 degrees and 32 minutes east; said course being at right angles to the boundary line of the St.

Louis Lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east on a line parallel to the aforesaid boundary line of the St Louis Lode Claim, between corners two and three, two hundred and twenty-six (226) feet to a point on the boundary line of the St. Louis Lode Claim, between corners one and two; thence south 20 degrees, 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis Lode; thence north 46 degrees, 10 minutes west along the line of boundary of said St. Louis Claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees, 28 minutes east along a line parallel to the boundary line of the St. Louis Lode Claim, between
106 corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained.

It is further ordered and adjudged that the plaintiff do have and recover from the said defendant its costs in this behalf sustained, taxed at the sum of one hundred fifty-five and 30/100 dollars.

And that the plaintiff have execution therefor, June 1, 1895.

HORACE R. BUCK, *Judge.*

STATE OF MONTANA, *County of Lewis & Clarke, ss:*

I hereby certify that the foregoing is a full, true, correct and compared copy of original complaint, answer, findings of fact by the court and judgment in case No. 2834 Montana Mining Co. Ltd. *vs.* Charles Mayger, *et al.*

In witness whereof, I have hereunto set my hand and seal this 1st day of June, 1905.

[SEAL.] SIDNEY MILLER, *Clerk,*
By R. C. CLEMENTS,
Deputy Clerk.

Complaints in Other Suits.

Plaintiff then offered in evidence the complaint in case No. 3214 pending in the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis and
107 Clarke, in which suit the defendant herein is plaintiff and the plaintiff herein is defendant, such suit was commenced on the 10th day of June, A. D. 1895, to recover the sum of $45,000 damages against the plaintiff herein for mining, taking, carrying away and conveying to its own use 224 tons of ore, such ore having been so mined by plaintiff within the surface boundaries, extended downward vertically, of the compromise ground. Said complaint was so offered and read in evidence as an admission on the part of the defendant as to the value of the ore in the compromise ground.

Plaintiff then offered and read in evidence a complaint in an action commenced in the state court by the defendant in this action against the plaintiff in this action to recover possession of certain ore or its value taken out of the ground in controversy north of the

108-foot plane and above the 40-foot level in which it was alleged that the amount of ore was 8 tons and the value of the ore was $1,600.00.

Defense.

Mr. W. E. Cullen, one of the attorneys for the defendant, thereupon made the opening statement for the defendant to the jury. In such opening statement Mr. Cullen stated that it was admitted by the defendant that the foot-wall of the Drumlummon vein crossed the west side line of the compromise strip approximately at its intersection with the 133-foot plane. (Plaintiff's amendment.)

The defendant to maintain the issues on its part called and had sworn as a witness in its behalf, one John H. Farmer, who testified substantially as follows, to wit:

108 JOHN H. FARMER.

I am a civil and mining engineer, I made a survey of the surface boundaries of the St. Louis and Nine Hour Claims about June 10th, 1905. I made a map of the two claims from this survey. The red mark on this map shown running parallel with the easterly boundary line of the St. Louis, and across the compromise ground is intended to represent the apex of the Drumlummon lode. It crosses the west line of the compromise ground at an angle of 31° 41′. It is 10.6 feet from the center of the discovery shaft on the Nine Hour to the nearest point of the east boundary line of the compromise ground.

And thereupon the witness was asked the following question:

Q. Drawing a line at right angles to that one (indicating the east line of the compromise ground) 50 feet from the center of the discovery shaft, on the Nine Hour, where would it bring it to on the map? That is from the center of the discovery shaft on the Nine Hour and at right angles to the line between corners 2 and 3 on the St. Louis?

To which question the plaintiff objected for the reason that the same was immaterial and irrelevant.

Which objection was sustained by the Court, and the witness was not permitted to answer the same.

To which ruling of the Court the defendant then and there duly excepted.

And thereupon the defendant's map was marked Exhibit "E" and introduced in evidence.

109 The Court in passing upon the last above objection said:

After examination of the pleadings and exhibits attached and reading such authorities that have been cited, I hold that the objections interposed by plaintiff are well-founded.

The way for the Court is clearly pointed out in the decision of the Circuit Court of Appeals in the 102 Federal, page 430. The judges there considered among other things that at the time of applying for a

patent the locators of the St. Louis included in their survey a portion of the premises which were claimed by the owners of the Nine Hour, and that the latter made an adverse claim and brought an action; that this suit was compromised by an agreement that as soon as patent was obtained by the St. Louis, the owners thereof would convey back to the owners of the Nine Hour the 30-foot strip "together with all minerals therein contained," that the owners of the St. Louis obtained patent but refused to make the conveyance; that suit was brought "for the purpose of settling and agreeing upon the boundary lines between the said Nine Hour Lode Mining Claim and the said St. Louis Mining Claim"; and that after a favorable result to the Montana Mining Company, the St. Louis Company conveyed the 30-foot strip "together with all minerals, etc., therein contained."

The Court interpreted the conveyance in question, having regard to its terms and the subject matter involved and the surrounding circumstances, in order to ascertain the intention of the par-
110 ties. The subject matter involved was mining ground. The surrounding circumstances were that a controversy had arisen, the application for patent, the adverse claim, the action thereon, the compromise, the agreement, the suit for specific performance. The decision of the Court was that by the compromise, the St. Louis Company admitted that the claim of the Nine Hour people, that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory, was correct; that is to say that the surface lines as claimed by the Nine Hour in the compromise were correct, and that the strip of land contracted to be conveyed was a portion of the Nine Hour Claim. The Court considered the antecedent circumstances referred to, leading up to and culminating in the deed, holding that they were properly to be considered in determining what was the intent of the parties to the contract. These antecedent circumstances are all part of the transaction which culminated in the deed, which finally executed the intent of the parties, as such intent had theretofore clearly expressed in the contract itself. There is no ambiguity in the contract and deed, and extrinsic evidence other than the writings themselves is not material.

The adverse claim, the action brought, settled, compromised and dismissed, the agreement made to convey the 30-foot strip, "together with all minerals therein contained," the suit for specific performance of the covenant, according to its terms, the decree made by the District Court of the State ordering specific performance of the
111 covenant, describing the property by metes and bounds, "together with all the minerals therein contained," and the deed made in pursuance of the decree, describing the property in the same terms, clearly expressed the whole transaction. There is no duty left to the Court to perform except to give legal effect to what the parties have expressly intended.

As indicated, this is not difficult in view of the decision of the Appellate Court, for it is expressly laid down that the use of the words "together with all the minerals therein contained" inserted in the contract and in the deed are not more inclusive or more significant

than the words universally employed in grants of mining claims, "together with dips, spurs, angles, and also all the metals, ores, etc., therein"; and that in the absence of terms in the contract and in the conveyance, clear and explicit, manifesting an intention on the part of the St. Louis people to surrender the whole of their contention concerning the true location of the boundary lines, and also to divest its claim of its extralateral rights, which had not been in litigation, and which had not been assailed by the owners of the adjoining claim, the use of the words "together with all the minerals therein contained" was not sufficient. The Court entertained no doubt that it was the purpose of the contracting parties to fix a boundary line between the two mining claims, reserving to each the rights that would have attached, if the boundary line had been settled without controversy. They state their latter proposition after con-
112 sideration "of all the circumstances"; that is to say, of the particular circumstances adduced that there had been litigation over this mining property, a contract, compromise and deed, the court expressly adding, "and the language of the contract and of the deed sustains that conclusion."

My belief is that the deed was executed having reference to the Acts of Congress, and that the words of the deed did not include the minerals in that portion of the vein apexing outside of the compromise strip and having their apexes within the boundary of the St. Louis claim. The title held by the parties to the covenant and the title they acquired by the patent was just a title as was created and authorized by the laws of the United States to a quartz claim as distinguished from a title to land at common law, and the phrase "together with all minerals therein contained," when applied to the estate and premises held by the parties under the acts of Congress is to be regarded with relation to such laws of the United States and should not be given the effect it would have at common law.

The pleadings and the exhibits referred to and made part of the pleadings satisfy me that the parties to the covenant contracted with reference to such statutory rights as each held or might acquire to a quartz mining claim, and that it was the intention to restore the compromise strip to the Nine Hour Lode claim so that it might be held intact as part of the Nine Hour claim, possessing just
113 such rights as it would have had if no claim had been made to it by the St. Louis Claim.

The metes and bonds in the description were necessary in describing the premises, and the conveyance was for the sole purpose of locating the surface and veins apexing within it; hence the phrase used in the deed will be limited to the estate and premises conveyed and the minerals therein contained, as defined by the statutes of the United States.

A careful reading of the opinion of the Circuit Court of Appeals shows that they regarded the instrument as one to convey back to the owners of the Nine Hour claim the 30-foot strip, and that execution of the deed was a restoration of the strip to the Nine Hour claim, of which it was always a part. This being so, its status is as if there had never been any trust relationship created, and as if it had never

been patented as part of the St. Louis claim. Therefore, I must sustain the objection introduced by the plaintiff to this testimony. The defendant can make its offer in writing and the record will be kept clear.

I did not make the survey for the adverse claim filed by the owners of the Nine Hour Claim against the application to enter the St. Louis, but I resurveyed the lines of the adverse strip as shown by the records in the land office. The area in conflict was one acre and ninety-eight hundredths.

The witness here produced another map made by himself and testified:

114 This map shows the St. Louis claim and all the workings on the St. Louis as shown on plaintiff's map, and in addition it represents the continuation of the level under the 65-foot shaft. I made a survey of the level from the bottom of the 65-foot shaft northeasterly, and it is correctly platted on this map. If continued in the same direction, the apex of the St. Louis lode would cross the east boundary line of the St. Louis claim about 508 feet north of corner No. 2. The lead at the face of this drift is dipping slightly to the west. (The map referred to was marked Exhibit "G" and introduced in evidence.)

Witness continuing: This is a map showing a longitudinal section through the Drumlummon vein at the top of the Montana Company's apex shaft. It represents the apex shaft, the west boundary line of the compromise ground. It also shows the 190-foot level, the 18-foot level, the 46-foot level, the 85-foot level, and the raise connecting the 190-foot level with the 85-foot level. It also shows the several blocks of ground claimed to have been extracted by the defendant as shown by the testimony of Mr. Parks. I put on these blocks after Mr. Parks' testimony was given for the plaintiff. Blocks 6 and 7 are not put onto the map, because I could not locate them from the testimony.

The defendant upon the Court's ruling that no extrinsic evidence would be considered to interpret or explain the language in the bond of March 7, 1884, offers to call to the witness stand the following witnesses, and to examine them on matters of extrinsic facts calculated to disclose the situation of the parties at the time the bond was executed, and the situation of the property, to wit, John Langan, William Robinson, Warren De Camp, F. P. Sterling, John W. Eddy and Joseph K. Toole.

115

The Court refused to permit the witnesses to be called to the stand and required the defendant to submit the facts in the form of an offer of proof, to which ruling of the Court the defendant then and there excepted, the Court basing its ruling upon the decision of the Supreme Court of the United States in Scotland Co. *vs.* Hill, 112 U. S. 183.

And thereupon the defendant offered to prove the following facts by the witness, John H. Farmer:

That he has seen the complaint in the adverse claim suit of the Nine Hour against the St. Louis, referred to in the complaint in the

specific performance case, and knows the description therein contained; that it represents an area of 1.98 acres, and that he has platted that description upon the map, Exhibit "E"; that it includes the 30-foot strip so called. That that area also carries the apex of the Drumlummon vein for a distance of several hundred feet, north of the 108-foot plane, as such apex is claimed by the plaintiff in this action, according to the development on its map, Plaintiff's Exhibit No. 1.

By Senator BROWN: Is this offered for the same purpose?

116 By Mr. WALLACE: This proof is offered for the sole and single purpose of showing as extrinsic evidence, the facts and conditions surrounding the property involved, and the parties to the compromise settlement, and for no other purpose whatever, and that 1.98 acres was involved in the adverse claim suit.

The plaintiff objects to any testimony for the purpose offered and as irrelevant and immaterial, and trying to put in extrinsic evidence, and not proper, and I add to the objection that so far as in I shall hereafter move to strike it out.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit such facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness Farmer, the defendant then and there and at the time duly excepts.

The defendant then offered to prove by the witness, William Robinson, present in court, that he was the person who located the Nine Hour claim, and the one who represented his co-owner Warren De Camp at the settlement of said adverse claim suit, which was made in Helena, and that he was a plaintiff in that suit. That the whole area in conflict in that suit was 1.98 acres, the boundaries being as shown upon the Farmer map, Defendant's Exhibit "E," and that all this strip described in the bond was the easterly thirty feet of said 1.98 acres.

117 That in regard to the situation of the parties at the time of the compromise settlement, the plaintiffs in the adverse suit, the owners of the Nine Hour, had a discovery at the Nine Hour shaft, which was then at the points shown on Plaintiff's Exhibit No. 1, on the Drumlummon lode; that that shaft was distant ten and one-half feet from the surveyed side line, and the patented side line of the St. Louis; that ore had been discovered at depth, and in the Drumlummon vein in that shaft. That they knew that the vein dipped to the easterly, and its apex lay for many hundred feet to the north of the Nine Hour shaft inside of the adverse claim area aforesaid. That there were no other apexes or known veins cropping out in the thirty-foot strip; that there were no actual survey marks or boundary lines claimed by either plaintiffs or defendants in the adverse claim suit to have been along the line represented by the west side line of the compromise strip. That the instructions this witness had from his co-owner, De Camp, with reference to the settlement, were that he was to surrender any portion of the surface so that he retained the rights to the ore beneath that had been all discovered in the Nine Hour

shaft; that he acted for De Camp at the settlement upon these instructions, and that he and his co-owners in the Nine Hour knew that they could not claim minerals at their discovery and in the Drumlummon vein, unless they secured themselves against
118 the apex rights, either by holding the apex and the surface in which it appeared, or by getting a conveyance of the mineral in the vein so apexing in the adverse area. That one of the co-owners of the Nine Hour was Judge F. P. Sterling, and also that the whole matter was all talked over when arrangement was made, and it was considered with William Mayger personally in Helena, who represented the defendant, Charles Mayger, and it was the distinct understanding that they were to have, in consideration of their giving up the ground outside of the 30-foot strip, and of the apex that lay without it all the ores and the quartz rock that lay under the compromise strip surface, regardless of where the apex of the vein in which they lay might be. Mayger asked that Messrs. Toole and Toole, who were then his lawyers, should draw the settlement agreement. This was acquiesced in. Afterward the instrument now shown witness, being the original bond here offered in evidence, was brought down to Sterling's office, and he was told by Mayger that the present Governor, Joseph K. Toole, had drawn it. That he had confidence in him, and was uncertain on two points, first, whether Mayger could pay the fifteen hundred dollars named in that instrument and refuse to deed the thirty-foot strip, and second, whether the instrument would give them the mineral-bearing rock within the thirty-foot strip, and under its surface, regardless of the apex. That he went up to Governor Toole himself, with the instrument, and asked him directly about each of these questions, and was assured by him that they would have to make the deed, and
119 that this instrument as drawn covered not only the surface, but gave them all the minerals underneath the surface, without regard to where the veins in which they lay might apex. Because of this assurance, and for no other reason, they accepted the instrument in question in settlement of the suit, and he and his co-plaintiffs dismissed the adverse claim suit.

As to the situation of the property, he would further say that the west side line of the Nine Hour, from the time it was located until the time it was patented, never was in any manner changed, and that the side line is the westerly line of the conflict area of 1.98 acres described in the adverse; that when the Nine Hour was originally located, the parallel single straight east side line of the St. Louis ran to the southeast corner stake of said claim, on the ground, which was planted twenty-five feet westerly of the said Nine Hour west side line, and the east side line of the St. Louis, as then located, of twenty-five feet on the south end, and fifty feet on the north end; that after he had made the discovery at depth in the Nine Hour shaft, it was known generally, and many people came up and tried to locate, and that shortly thereafter a new stake appeared away up in the Nine Hour surface. It was on the undisturbed country, never had been there before, and made the south end line of the St. Louis one thousand feet long. It included his Nine Hour discovery shaft, and

all of the adverse area and very much more beside. When
120 the St. Louis surveyed for patent they started their east survey line down toward that stake, but when they got to a point within a short distance north of his Nine Hour shaft, they stopped at corner No. 2, put up a monument that had never been there before, and bent to the southwesterly, running an angular side line to their corner No. 3, all as shown on plaintiff's map, Exhibit No. 1, as to corners No. 2 and 3.

Plaintiff objected to it for the same reasons, and for the additional reasons that it tends to set aside solid deeds, records and decrees, by hearsay testimony, and by the imaginary thought of Mr. Robinson, as he recollects twenty years ago.

By the COURT: I will sustain the objection.

To which ruling the defendant duly excepted. This exception by consent of Court was deemed to apply to the Court's refusal as to each separate fact offered to be proven by the witness De Camp, and separate exceptions being to be taken as to each separate fact.

The defendant then offered to prove by the witness Warren De Camp, the following facts:

That he was a co-owner in the same adverse claim suit, and a co-owner in the Nine Hour very shortly after its location. He knew the settlement that was made of the adverse claim suit, and that he directed William Robinson to represent him in that settlement, which was had in Helena, he being at Marysville, and his instructions to Robinson were as stated in the offer of proof in the case of the
121 witness, Robinson, and the reasons for giving the said instructions were as therein stated. That this witness knew that the Nine Hour location west side line had never been changed; that it was the west side line of the adverse area in said adverse suit, and that as it was originally located there was a clear space between the east side line of the St. Louis, which was straight, single and without a turn or angle, of 25 feet to the south end and 50 feet on the north end. That he knew the southeast corner so marked of the St. Louis claim, as located, and that it was 25 feet at the nearest point from that stake to the Nine Hour west side line. That Robinson made a discovery of ore through a shaft at what is now marked Nine Hour shaft, on Plaintiff's Exhibit No. 1, and that that ore was in the Drumlummon vein, and that it was known that it apexed westward of the compromise strip, but within the adverse area, and that the adverse area carried the apex northward for several hundred feet, from the Nine Hour shaft, and for several hundred feet beyond the 108-foot plane. That other people had tried to come up and locate on the hill; that the vein dipped to the easterly. That after this discovery the stake that had been marked "southeast corner stake" of the St. Louis before was newly shaved and appeared with a mark on it "S center stake of St. Louis," and a new stake appeared way to the eastward in the Nine Hour claim, itself marked "Southeast corner of St. Louis claim," making the south end line of that claim one thousand feet about in length, and including between that last-
122 named state and corner No. 1 of the St. Louis, the greater portion of the Nine Hour surface, and practically all of the

adverse ground and the Nine Hour shaft where Robinson had made his discovery. That in the following summer the survey for patent of the St. Louis was had, and they ran their east side line from corner No. 1 down toward this new southeast corner stake, but stopped at corner No. 2, where they placed a survey monument and where no mark had even been before, and then they ran the line 2-3 as shown on Plaintiff's Exhibit No. 1. That witness was willing to surrender a portion of the surface of the adverse in order to be secured in the minerals and ores at depth where the Robinson discovery was, and in that vein, and he so instructed the witness William Robinson in that regard.

Plaintiff objected to it for the same reasons heretofore stated, for the reason that whatever previous transaction was had, whatever thoughts or talks were had between this witness and Robinson and anybody else, the contract merged in the decree and is long since settled.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts or any of them to be proved, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the
123 witness De Camp, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness Frank P. Sterling that he was a co-owner in the Nine Hour at the time of the adverse claim suit and the settlement; that he was a lawyer and that he understood the rule as to apex rights; that he was advised of the situation on the ground as detailed by the offer of proof in the case of the witness- De Camp and Robinson as between the St. Louis and the Nine Hour Claim, and as to the discovery of ore by his co-owner Robinson in the Nine Hour shaft and the dip of that vein. That Robinson was present when the settlement negotiations were carried on and concluded in his office; that they transpired largely between William Mayger, who represented the defendant and his brother, Charles Mayger, and this witness; that the question of the adjustment was discussed between William Mayger and himself, and it was finally determined that the Nine Hour owners would give up the excess ground covered in the adverse if a sufficient area should be awarded the Nine Hour people, north of the Nine Hour shaft to protect them in the substantial enjoyment of the mineral that they had discovered in that shaft, which was the Drumlummon vein; and that this amount was agreed upon at fifty feet, but by some error in the actual description as contained in the agreement, to wit, the bond drawn by Governor Toole only covered forty and a fraction feet. That in consideration of this surrender of the surface
124 and the apex right within the surrendered portion of the adverse area the defendant Mayger was to and did forego all claim to any mineral lying beneath the surface af the compromise strip and its vertical plane without regard to where that mineral or the rock containing it might apex. William Mayger asked that Messrs. Toole and Toole, his attorneys, should draw the settle-

ment instrument; this was acquiesced in and it was drawn by Governor Joseph K. Toole. When it was brought down for consideration, Robinson brought up the question of whether the fifteen hundred dollars named in the bond could be paid instead of giving a deed, and also the question as to whether the language as to minerals in the description covered the point desired, so as to include any minerals of any kind found beneath that surface, and he insisted on going to Gov. Toole with the instrument to talk it over. After he came back the instrument was sent to Marysville to be signed by Charles Mayger, and when it was returned, signed and acknowledged, we dismissed the adverse claim suit. We never would have accepted this less area of ground, or dismissed the adverse claim suit, except for the fact that we *were* preserved the minerals in the vein that we had discovered from the point of discovery on its dip to the eastward, and it was distinctly agreed between the parties to said bond that all such minerals should be and remain the property of the obligees therein named, and to their assigns.

Plaintiff objected to it for all the reasons stated in the
125 offer as to Farmer, Robinson and De Camp, and all the other witnesses, and for the further reason it expressly appeared that this witness, whatever the talk and understanding was, was merged in the bond and must speak for itself.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven and to the refusal to permit each and every single one of said offered facts to be proven by the witness Sterling, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness John W. Eddy that he was a co-owner in the claim at the time of the settlement, and that he was a lawyer, and further offers to prove substantially the same facts as set forth in the offer of proof as to the witness Sterling, except that Sterling and not Eddy conducted the negotiations with William Mayger, but Eddy was present.

Same objection.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, and to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the wit-
126 ness Eddy, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness John Langan that he had lived in Marysville always from the time of the location of the original Drumlummon and before the location of the St. Louis down to the present time. That he knew Cruse mountain thoroughly; that he heard of the William Robinson discovery in the Nine Hour on what is the Drumlummon vein at the Nine Hour shaft, as marked upon Plaintiff's Exhibit No. 1, and that immediately thereafter he went upon the ground intending to make a location; that the surface was cleaned then of all obstructions, rocks or

brush, and any stakes in the vicinity on the south end could be readily seen. That he found the southeast corner stake so marked of the St. Louis claim; that he knew the west side line of the Nine Hour and its boundaries and knew where the stakes were, and that the line from the northeast corner of the St. Louis to the southeast corner stake as it then was on the ground passed 25 feet to the westward of the west side line of the Nine Hour at the south end of the St. Louis, and fifty feet to the westward at the northwest corner of the Nine Hour. That in the following year this stake was freshly blazed, viz., the southeast corner stake of St. Louis and marked "S end center stake of St. Louis," and that a new stake many feet to the eastward appeared in ground where
127 it never had been before, marked "Southeast corner stake of St. Louis" and opposite the point that the survey line 1-2, on Plaintiff's Exhibit No. 1, the map, if continued in this direction, would have reached it, making the south end line of the St. Louis then about one thousand feet long. That there was no monument or mark of any kind at the survey corner No. 2 on the east side line of the St. Louis, as shown on Plaintiff's Exhibit No. 1, until the following summer, when the survey for patent of the St. Louis was made, when that monument was first put up, and the same is true of the survey corner No. 3. That this witness has no interest whatever in this controversy and is in no manner related in business or otherwise connected with any of the parties concerned.

Plaintiff made the same objection to it and all of these other offers connected with these witnesses; they are all applicable to this offer.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness Langan, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness- Robinson and De Camp that prior to the change in the southeast corner stake
128 of the St. Louis claim there was no stake whatever standing within the boundaries of the Nine Hour Claim as stated. That after the stake marked southeast corner St. Louis had been moved up onto the Nine Hour ground they went together and removing the stones found piled around said stake, found the grass of 1881 green and growing under there.

Same objection as to Robinson.

By the COURT: I will sustain the objection.

The Court having refused to permit such facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witnesses Robinson and De Camp, the defendant then and there and at the time duly excepted.

The defendant offered to prove by the witness J. K. Toole that while he had no distinct recollection of drawing the bond for a deed which is exhibit "A" attached to the answer, he recognizes the same

as being drawn by him, and that he is able to say that the words "together with all the minerals therein contained" were inserted therein because he was informed at the time the bond was drawn that it was the agreement of the parties, obligor and obligee therein named.

Plaintiff objected to it as entirely irrelevant and immaterial.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts, or any of
129 then to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness Joseph K. Toole, the defendant then and there and at the time duly excepted.

The defendant at this time and as a part of the proof explanatory of the bond contract and the phraseology therein contained at the close of the metes and bounds description, as follows, "together with the minerals therein contained," offers in evidence the original bond from Charles Mayger to William Robinson, acknowledged March 7th 1884, and recorded March 8th, 1884, on page 325 of book 4 of Miscellaneous records of Lewis and Clarke County, Montana, for the purpose of showing that the same is a pen and ink writing and all, save the acknowledgment, in the handwriting of J. K. Toole, who witnesses the instrument.

Plaintiff objected because the bond in itself is immaterial; because it is made a part of the answer in this case and therefore it is unnecessary and not only conceded in this case, but was the basis of a former suit.

By the COURT: I will sustain the objection.

To which ruling of the Court the defendant then and there duly excepted.

The defendant then offered in evidence the complaint, the original complaint, and the replication in case No. 2798, old series,
130 William Robinson, *et al. vs.* Charles F. Mayger, being the adverse claim suit referred to in the record, in the specific performance case put in evidence by the plaintiff as a part of its case, for the purpose of showing that the area involved was the 1.98 acres testified to as shown upon Defendant's Exhibit "E" by the witness John H. Farmer.

To which plaintiff objected as being immaterial.

Such objection was sustained by the Court and the defendant then and there duly excepted. And said complaint did describe as the area involved, the said 1.98 acres.

The defendant called and had sworn as a witness for the defense one Samuel E. Bowlby, who testified substantially as follows:

SAMUEL E. BOWLBY.

I live at Marysville, Montana, and I am in the employ of the Montana Mining Company, Limited. I have been in the employ of this company for 11 years. I was one of the bookkeepers from the year 1894 until September, '99. My title was store-keeper, but

I was assistant accountant. The books which I have produced here are the company's books kept in the regular course and conduct of its business. I first produced what is known as the revenue book. This book is the monthly sheets, it is a complete record of the cost of mining and milling and of all expenses connected with the company from the first to the last of the month inclusive. Here
131 is the stock ledger, another of the company's books. It is marked "Ledger of the Montana Mining Company, Limited," and it covers the period represented by the monthly sheets that I have spoken of, to wit, November 1, 1898, to May 1, 1899. This book is the invoice book, it is marked "Invoice from December, 1897, to April, 1899." It is one of the regular business books of the company kept as such during that period. This book marked "Cash Montana Mining Company, Limited," is the only cash book kept, except petty cash during the periods referred to. This abstract, Defendant's Exhibit "J," is a tabulated statement of the contents of the books. I am familiar with it. I have checked the first column marked "A" with the revenue sheet, the figures are the result developed under that head. Column "B" I checked against the revenue sheet and found it correct, so also with columns L, M, N, O, P, Q and R, they are correct.

Whereupon the company's books were offered and received in evidence, as also was Defendant's Exhibit "J."

Defendant called and had sworn as a witness in its behalf, one Albert E. Gregory, who testified as follows:

ALBERT E. GREGORY.

I am 25 years old. I live in Marysville, Montana. I am the bookkeeper for the Montana Mining Company, Limited, and
132 have been such bookkeeper for three and a half years. I have examined this abstract, Defendant's Exhibit "J." It came from the business account books of the company and from the bullion books and other books identified by Mr. Bowlby. I have checked column "C" with the books and found it correct, as also column D, E, F, G, H, I, J, K, T, U, V, W and X.

Whereupon defendant offered in evidence "Abstract J" which was received in evidence over plaintiff's objection. Such abstract is as follows, to wit:

(Here follows table marked p. 133.)

Date	a Tons to 50 mill m. d.	b Mining and Milling per ton m. m.	c Cash from bullion	d Cash from Concentrates	e Total Cash c + d	f 50 stamp assay value	g 20 stamp assay value	h Tailings per ton from 50 mill
1898								
Nov.	3470	£ 5 7s	£ 23993 58	£ 2702 20	£ 26696 88	£ 5.39	£ 13.25	£ 2.79
Dec.	3616	5 2s	24826 67	2411 38	27275 05	5.01	15.18	3.22
1899								
Jan.	3646	5 11	27355 45	1753 23	29108 68	4.86	13.22	2.79
Feb.	3400	6 01	30950 34	2438 39	33388 73	4.80	17.45	3.75
Mch.	3686	4 17	19975 79	2874 95	22850 74	5.43	14.57	3.09
Apl	3590	6 60	28263 98	5187 97	33451 95	5 60	17 80	3.47
	21408	£ 5.57	£ 165565 81	£ 17406 12	£ 182971 93 c/a = 87%		£ 14 44	£ 3.02

c/a = 670 ? 680 ton Say c/a = 81%

i	j	k	l	m	n	o	p	q ¶	r	s t	u	v	w	x
per cent recovered per battery $\frac{h}{g}$	Average per ton $\frac{n}{a}$	Per cent cash recovery $\frac{s}{n}$	60 - mill tons	50+60 Mill total tons a+b	Total cost mining & Milling	50 Mill cost per ton	60 Mill cost per ton	Total milling costs	50 Mill total cost of milling	Tons in 20 side $\frac{2}{5}$ of a	Tons in 30 side $\frac{3}{5}$ of a	20 stamp bullion contents t x g	30 stamp bullion contents w x f	Total 50 mill bullion contents y + w
67.33	$ 8.54	90.10	3580	7050	$ 40396.70	$ 2.09	$ 0.95	$ 10657.49	$ 7267.60	1388.0	2082.0	$ 18391.00	$ 11,238.63	$ 29,629.63
64.54	9.08	83.09	3659	7275	38,067.18	2.01	.74	9959.91	7276.56	1446.4	2169.6	24,956.35	10,869.70	32,826.05
66.00	8.20	97.98	3600	7246	37,795.91	1.98	.81	10,135.10	7216.42	1458.4	2187.6	19,280.05	10631.74	29,911.79
65.00	7.86	87.52	2730	6130	36,860.36	1.94	1.02	9,372.06	6586.32	1360.0	2040.0	16932.00	9,792.00	26,724.00
66.08	9.08	68.23	3200	6886	32,531.33	1.90	.96	10,077.46	7019.27	1474.4	2211.6	21,482.01	12008.99	33491.00
66.93	10.50	88.71	3100	6690	43442.51	2.24	1.11	11,487.28	8040.65	1436.0	2154.0	25,560.80	12,148.56	37,709.36
66.00	$ 8.88	85.60	19869	41277	$ 230093.99	$ 2.03		$ 61,689.30	$ 43406.82	8563.2	12844.8	$ 123,607.21	$ 66,689.62	$ 190,291.83

$\frac{m}{m}$ = 4.08 · mining and [illegible]
$\frac{\text{cost}}{611}$ = 3.03 · milling · ·

Depts Ex J

134 & 135 Defendant also called and had sworn one Thomas Lahiff.

THOMAS LAHIFF.

I live in Marysville, Montana. I have been mining for 17 years. I worked in the Drumlummon mine commencing in '89, and continuously until last February or March. I accompanied Professor Parks on the 20th day of July, 1899, when he was sampling the Nine Hour apex shaft. He took six samples, five of them in the apex shaft, and one in the 85-foot level. I kept a memorandum at the time. At the first point he took two sacks, this was 18 or 20 feet below the surface. Number 2, he took three sacks. Number 4, he took one sack. Number 5, he took one sack. Number 6, the 85-foot level, about 35 pounds. I think the first three samples were all taken over the 20-foot level. The sampling was not fairly done. It was what might be called a picked sample. He took too much of the bright stuff, the richest ore, letting the balance go.

GEORGE H. BURLEY, witness on behalf of the defendant, being first duly sworn, testified as follows, to wit:

GEORGE H. BURLEY.

My name is George H. Burley. I am 38 years of age. I have lived in Marysville, Montana, for 12 years. I have been engaged in mining for 24 years, in quartz mining 17 years. I know the Drumlummon vein and am familiar with its ores. Last
133 Saturday we went down below the top of the Montana Company's apex shaft, a distance of about 20 feet of the collar. We cut cribbing at that point and drove in a drift in the north end. We ran in 8 feet in copper stained quartz in place. In running the 8 feet, we ran downward, so that at the end the drift was about 2 feet lower than the point where we started in the apex shaft.

Defendant also called and had sworn as a witness in its behalf one CHARLES W. GOODALE, who testified substantially as follows, to wit:

CHARLES W. GOODALE.

I am 50 years of age and am a mining engineer. I have lived in Montana for 20 years. I graduated from the institute of Technology in Boston in 1875, and have been continuously engaged in the practice of my profession ever since. I have known the Drumlummon vein or mine since 1893. I was consulting engineer for the Montana Mining Company, Limited, the defendant, from 1893 to 1898. I am familiar with the manner in which the business books of the company are kept, and with the method of keeping mining accounts in general use in this state and elsewhere. I am familyiar with the methods pursued by the Montana Mining Company, Limited, the defendant herein, in keeping its accounts and from such it is easy to determine the cost of mining and milling the ores,

and the amount or value of the product. I have made an
137 examination of the defendant company's books to determine the cost of mining ore as mined by them from December 1, 1898, until May 1, 1899, and I have an abstract made in part by myself of such books for that period. The books I used are here in court. The abstract is Defendant's Exhibit "J." The defendant has two quartz-mills known as the 50 and 60-stamp mills. The part of their mills used for ores carrying silver, was the 20-stamp side of their 50-stamp mill. The cost of mining and delivering the ore to the mill was $4.08, the cost of milling per ton during that period was $2.03. The cost of mining and milling as given included all development work, salaries of officers of the Montana Company, taxes, insurance and hay and oats for the stock. Eliminating these last-mentioned items the cost of mining and milling would be approximately $5.00 per ton. The saving as shown by the books was 85.6% in bullion and concentrates of the battery, which was a good recovery.

The 46-foot level represents about the richest part of the ore body taken vertically. Block 10 is below the good ore area. The 190-foot level or about 100 feet of it was run while I was with the company as its consulting engineer. The ore in block 10 is very low grade, so low that for the last 20 feet of it at least, it would not pay for mining and milling. There would be no difficulty in getting a sample from the back of block 10 in the 190-foot level. Blocks 4 and 9 are still in the ground. In 1899, prior to the former trial of this case, I visited the ground and I saw
138 high-grade ore above the 18-foot level. I went up to the surface, satisfied myself by examination going up that these blocks remained in the ground. That is the two blocks, the 4 and 9 are substantially the same thing, being divided only by an imaginary line. I went up through the plaintiff's stopes on the north side of the ground from the 20-foot level to the surface and saw the north side of the ore body all the way up.

I have examined the Drumlummon vein in the St. Louis claim. It enters the claim at about the 520-foot plane. No part of the apex passes through the north end line of the St. Louis. I have examined all of the workings of the plaintiff in that vicinity and found no evidence that the Drumlummon vein passes through the end line of the St. Louis.

I have examined the veins in the St. Louis claim. The discovery shaft as marked on the map, Plaintiff's Exhibit No. 1, is to the south of the Transcontinental tunnel, there is a drift and a shaft. I have examined the tunnel very carefully recently, and I also examined it in 1893. The vein carried by the south drift is not the same vein as that carried by the north drift out of the Transcontinental tunnel. Opposite where the north drift enters the Transcontinental tunnel or nearly so, there is a seam which is a possible extension of that vein. No attempt has been made to develop that seam, except with a sample pick just picking into it a little. I have been through the north drift to its face, it measures about 247 feet in length.

139 Cross-examination:

The figures I gave of the cost of mining of $4.08, cover the last two months of '98, and the first four months of '99. I was not operating the mine at that time. I formed my opinion from the figures I found in the books, and the same with reference to the milling of $2.03.

I took the last course running north in the level from the 65-foot shaft, the discovery vein. It was no-th 49° east, magnetic. I have made no complete survey of the 65-foot shaft level. I helped measure the drift out and in the last course of it I noticed it was bearing to the north 49° east as already stated, for something like 35 or 50 feet.

The defendant called and had sworn as a witness in its behalf, one ALEXANDER BURRELL, who testified substantially as follows:

ALEXANDER BURRELL.

I am 54 years old, and I am manager of the defendant company. I know where the 108 and the 133-foot planes are. Such ore as was taken out between those planes was mined between the first day of November, 1898, and about the middle to the 20th day of April, 1899, containing a large amount of silver. It was treated on the 20 side of the 50-stamp mill, which was reserved for
140 this class of ore, being specially fitted for working silver ores.

I have been connected with the defendant company for 17 years.

Cross-examination:

We had at one time what we called our danger line, this was the east line of the compromise ground, and we worked up to that line until we received the deed, after the judgment had been affirmed in the Supreme Court of the United States. Prior to the receipt of the deed, we extracted ores to the easterly and below that line on the dip of the vein. All of the ore which was extracted in the vein south of the Montana company's apex shaft to the 133-foot plane and above the 190-foot level was taken out by the defendant prior to June 1st, 1899.

The defendant called and had sworn as a witness in its behalf one CARLETON H. HAND, who testified as follows:

CARLETON H. HAND.

I am 46 years old. I reside in Butte, but at present am operating in Idaho. I am a mining engineer and assayer and have been engaged in that business since 1880. I know the St. Louis mine at Marysville, and knew it in 1893. In 1893, by the direction of Mr. William Mayger, about the middle of November of that year, I took certain samples in the Nine Hour claim of the defendant and

assayed them myself. Among others I took a sample about 10 feet above the defendant company's 190-foot level, on the
141 north face of the Montana company's stope. The assay of this sample was 1.1 oz. in silver, gold $1.60, or a total of $2.26 per ton. The next sample was No. 9 of the foot-wall streak, it was taken from about 20 or 30 feet above the 190-foot level. The sample taken was across a face of 8 feet. I obtained an assay of it of silver 6.1 oz., gold $10.40, total value per ton $14.06. My next sample was about 10 feet above where I took the sample last-mentioned. It was taken from 4½ feet of the hanging-wall streak at that point. That assayed 12.2 oz. in silver, $12.40 in gold, making a total of $19.72 per ton. I did not take any sample out of the 190-foot level, though I went to the north face of that level. I was looking for ore of value to see what had been extracted from the stopes or from the mine, and the appearance of the level was such that it did not appear to me to have any value, therefore I did not sample it.

Thereupon defendant recalled CHARLES W. GOODALE, who testified substantially as follows:

CHARLES W. GOODALE.

I have seen Defendant's Exhibit "J." I checked columns C, D, E, I, J, K, T, U, V, W and X, and found them correct. The average value of the ore treated during the periods referred to was $14.44. The total expense of the treatment was $7.30 leaving a net balance of $6.48.

142 Defendant likewise called and had sworn one CHARLES A. MOLSON, who testified substantially as follows:

CHARLES A. MOLSON.

That he was 44 years of age; that he was a mining engineer, had followed that profession for 25 years; that he had learned his profession in Montreal, Canada; that he was for two years on the geological survey in Canada and was afterwards with the Pueblo Smelting and Refining Company of Pueblo, Colorado, and with sundry and divers other companies. That he had examined the discovery vein in the St. Louis mining claim, and was familiar with the Transcontinental tunnel and the levels running north and south from it. That he had examined the 65-foot shaft and the levels at the bottom of it.

The vein carried in the south drift from the Transcontinental tunnel is not the same vein as carried in the north drift. The vein in the south drift is cut off by the fissure which is followed in the Transcontinental tunnel. To the eastward of the said drift there is a slate and granite contact, there is at that point a possible movement of 8 or 9 feet indicated, but there has been no throw of 90 feet, there is nothing on the surface to indicate such a throw. The

last 84 or 85 feet of the level in the north drift shows a turn of 10° to 12° northeast, and if the vein continues in the same direction, it would cross the easterly side line of the St. Louis
143 claim near the 520-plane. There is a fissure on the southwesterly or right-hand side of the Transcontinental tunnel as you enter, which may be the continuation of the plaintiff's discovery vein. Where it goes to, I cannot say, as there is no work done on it.

I made an examination of the books of the defendant company that were offered in evidence here in connection with the preparation of Exhibit "J." Exhibit "J" is a correct abstract of what is shown on the books of the company. The value of the ore worked on the 20 side of the 50-stamp mill from November 1st, 1898, to May 1st, 1899, was $14.44 per ton. The cost of mining between the said periods as shown by the company's books was $4.08. The cost of treatment in the mills $2.03, which was reasonable both as to mining and milling.

Defendant also called and had sworn one WILBUR E. SANDERS, who testified substantially as follows:

WILBUR E. SANDERS.

I am a mining engineer. I graduated in 1885 from the Columbia Schools of Mines in New York City, and since graduating I have had about 7 years of experience both working as a practical miner and in my business as mining engineer. I am acquainted with the properties here in controversy and have made a study of them. I examined the surface of the St. Louis mining claim for the
144 purpose of ascertaining the course of its discovery vein. I saw nothing on the surface which indicates the course of the vein. I examined the Transcontinental tunnel. From its entrance in for a distance of about 100 feet it is closely cribbed, and it is in granite and porphyry. The drift on the discovery vein from the Transcontinental tunnel runs to the bottom of the 65-foot shaft in granite. The walls of the vein are very nearly vertical. Where the north drift strikes the Transcontinental tunnel it turns toward the mouth of the tunnel as you go out and there is evidence of drag in that direction. About ten feet from the shoulder of the tunnel there is a vein fissure which goes into the south wall of the Transcontinental tunnel, it is apparent at that point from the drag of the quartz in that direction that there has been a faulting there, not a large one, but from 10 to 12 feet. The vein has been thrown by the Transcontinental fault fissure. The dip of the drift on the discovery vein and that of the fissure showing on the southwest side of the Transcontinental tunnel is practically vertical.

From the bottom of the 65-foot shaft, the course of the vein is north 73° east, and if it continues in that direction it would cross south of the 520-foot plane as shown on plaintiff's map. If the discovery vein from the point at which it is shown in the fissure on the

southwest side of the claim makes as much of a turn to the west as is found in the north end of the vein toward the east, it would cross the west side line of the claim.

145 I can find no evidence that the vein shown in the south drift from the Transcontinental tunnel is the same vein as plaintiff's discovery vein. I was not able to find any drag in the tale in the Transcontinental tunnel which would indicate a throw. Beyond the south drift where the granite meets the slates, there is the same throw as is shown by the discovery vein, and the fissure on the southwest side of the Transcontinental tunnel of which I have already spoken, and the throw as shown by the slate and granite contact, and by the discovery vein and the small fissure, is in the opposite direction to the throw as claimed by the plaintiff for its vein. If there had been a throw of 90 feet, one would expect to find a corresponding throw of the slate and granite contact, and to find it displaced in the same direction to about the same distance.

The defendant called as a witness in its behalf, one Miles Cavanaugh, who being first duly sworn, testified as follows:

MILES CAVANAUGH.

I am 69 years of age. I have mined all my life. A great deal of my mining was quartz. I know the St. Louis and the Nine Hour claims. I went up there to sample a portion of the 190-foot level in the Nine Hour. I got into it through the 85-foot level of the plaintiff. I sampled about 30 feet from the north end of the level. I commenced at the north end and I got down as near as I could get to three inches all around the north end, then I turned and got

146 the same amount by way of crossing the back from the hanging-wall as near as I could get to about five feet. I could not get the foot-wall exactly. I sampled all the way back for about 30 feet. This is 3 or 4 inches was the width of a strip or the thickness of a strip. I spread a canvas and took my samples on that and sacked it as quick as I got it down. I sealed up the sacks and shipped it by express to Helena. Then I got a team and took it to East Helena and delivered it to Mr. Smith of the East Helena Smelter and received a receipt for it.

Which receipt was introduced in evidence, marked Defendant's Exhibit "N," and read to the jury as follows:

DEFENDANT'S EXHIBIT "N."

EAST HELENA, MONT., *June 26th*, 1905.

Received of Miles Cavanaugh 40 sacks of ore, gross weight 2085 pounds.

AMERICAN SMELTING & REFINING CO.,
By F. M. SMITH,
Assistant Manager.

Defendant's Ex "C"

MINE

SHIPPING POINT Marysville

ORE BOUGHT OF Miles Cavanaugh

American Smelting and Refining Co.
EAST HELENA PLANT.

Date Settlement JUN 25 1905 190

ASSAY PER TON			PERCENTAGE		PRICES		DEBIT	CREDIT
GOLD	0.11	Ounces	For 95 Per Cent		120	Per Ounce		2.09
SILVER	1.0	Ounces	For 95 Per Cent		58 3/8	Per Ounce		.56
LEAD		Per Cent	For 90 Per Cent			Per Cwt.		
COPPER		Per Cent	For 100 Per Cent Less 1-8			Per Pound Copy		
SILICA		Per Cent				Excess		
IRON		Per Cent				Excess		
ZINC		Per Cent	Over 10 Per Cent			Excess		
MANGANESE		Per Cent				Freight and Treatment per Ton		
LIME		Per Cent				Totals		2.65
SULPHUR		Per Cent				NET VALUE PER TON		

Serial Number	Our Number	Car Number	Gross Weight	Per Cent Moisture	Number of Sacks	Net Weight	Per Ton	DEBIT	CREDIT
	611				140				
	Mine No. a	Dean	2061	7.2	214	1913		Good Low grade	
							Freight		
							Sampling	10-	
							Totals		
							NET PROCEEDS		

DATE ASSAY June 27 1905.

Handling &

Lot Sinclair CHIEF ASSAYER

A CHARGE OF FIVE DOLLARS MADE FOR SAMPLING ON ALL LOTS OF ORE CONTAINING LESS THAN FIVE TONS. RATES EXCEPT ON CONTRACTS FOR SPECIFIED TIME OR SPECIFIED TONNAGE, SUBJECT TO CHANGE WITHOUT NOTICE.

Please Sign and Return Enclosed Voucher to us Promptly

KEEP THIS STATEMENT

E. H. 13-1-05-10 M

AMERICAN SMELTING AND REFINING CO.

By _____

Quotations used Date Settlement _____ Checked by _____

There would be no material change in the character of the ore that would be found 7 feet below the back of the level from what the ore which I obtained from the back of the level and which made my sample.

Thereupon the defendant offered in evidence the certificate of the American Smelting and Refining Company marked Defendant's Exhibit "O."

(Here follows Certificate marked p. 147.)

148 & 149 Thereupon the defendant recalled Samuel E. Bowlby, who produced the defendant's bulletin book, and who testified as follows:

SAMUEL E. BOWLBY.

During the six and a half months ending June 30th, 1893, there was worked in the defendant's company's mills at Marysville 33,731 tons of ore, making an average yield of $7.27, or total gross yield $287,907.00.

The half year ending 31st of December, 1893; tons 32,553, average yield $9.98, gross yield $324,726.

For half year ending June 30th, 1894; tons 34,613, average yield $12.61, gross yield $63,446.00.

For half year ending 31st of December, 1894; total tons crushed 38,010, average yield $14.18, gross yield $539,148.

For half year ending June 30th, 1895; tons of ore crushed 27,230, average yield per ton $19.98; gross yield $544,061.00.

For half year ending December 31st, 1895, tons of ore crushed 37,790, average yield $13.14, gross yield, $496,662.00.

For half year ending June 30th, 1896; tons of ore crushed 37,180, average yield $10.36, gross yield $385,051.00.

For half year ending December 31, 1896; tons of ore crushed 25,150, average yield $11.20; gross yield $281,723.00.

150 For half year ending June 30th, 1897; tons of ore crushed 6,820, average yield per ton $14.58; gross yield $175,975.00.

For half year ending December 31st, 1897; tons of ore crushed, 37,290; average yield per ton, $9.48; gross yield, $353,620.00.

For half year ending June 30, 1898; tons of ore crushed 38,215; average yield per ton, $7.91; gross yield, $302,317.00.

For half year ending December 30, 1898; tons of ore crushed 40,130; average yield per ton, $7.62; gross yield, $30,598.00.

For half year ending June 30th, 1899, tons of ore crushed 37,652; average yield per ton, $7.48; gross yield $281,723.00.

It having been shown that William Philpotts who was a witness for the defendant on the former trial of this case, *and who* is now absent in Australia, and not within the jurisdiction of this court, his testimony which was given on the former trial, was read from the stenographer's notes.

WILLIAM PHILPOTTS.

I am a mining engineer. I learned my profession in the Campbell School of Mines in England. I have been with the defendant company for five years. I know the 190-foot level and plaintiff's block 10. I took six samples in there. The first one 23 feet south of the north face. The second one is a sample of the ore that is in

151 the drift. The third one is a sample taken about 16 feet south of the north face. The fourth is about 12 feet south of the north face. The fifth is 6 feet south of the north face, and the

last one is a sample of the face. I am an assayer. I assayed these samples in the usual method. I made a sheet of the assays. Sample No. 1 went 0.12 of an ounce in gold and 0.6 of an ounce in silver, total value $3.34; No. 2 contained 0.11 oz. in gold and 0.9 oz. in silver, total value $3.41; No. 3 contains 0.12 oz. in gold and 0.5 oz. in silver, total value $3.38; No. 4 has a trace of gold and 0.7 oz. in silver, total value 42 cents; No. 5 has a trace of gold and 0.5 oz. in silver, total value $.30. No. 6 is 0.2 in gold and 0.8 oz. in silver, total value $.89. Thereupon the defendant produced a duly certified copy of the answer of the St. Louis Company in the case of the Montana Mining Company against the St. Louis Mining and Milling Company, known as the Specific Performance case, and read to the jury the verification to said answer, which said verification is as follows:

Verification.

STATE OF MONTANA, *County of Lewis and Clarke, ss:*

Wm. Mayger, being duly sworn, makes oath and says that he is the general manager and superintendent of the said defendant company, and as such is an officer and agent thereof; that he has
152 read the foregoing answer and knows the contents thereof; that the matters and facts therein stated are true to the best of his knowledge, information and belief.

WM. MAYGER.

Subscribed and sworn to before me this 17th day of December, 1894.

[SEAL.] HARRY H. YAEGER,
Notary Public.

Nine Hour Patent.

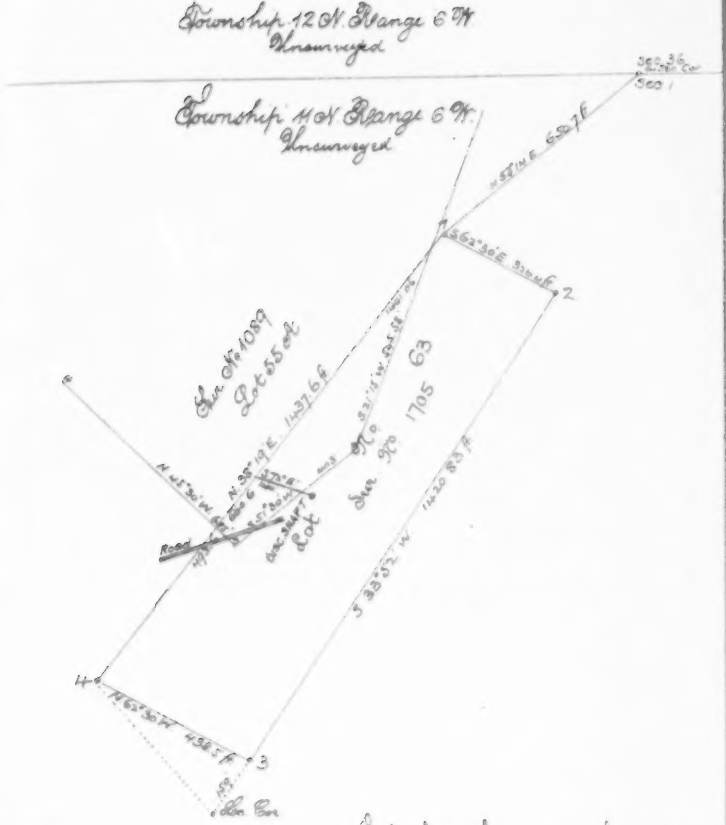
The defendant offered and read in evidence a patent of the United States, being Mineral Certificate No. 1357 issued to Charles A. Broadwater and others, for the Nine Hour Lode Mining Claim, designated as Lot No. 63, and describing the premises so conveyed as follows, to wit:

"Beginning at corner No. 1, a slate stone 33 x 15 x 9 inches marked 1-1705, a mound of rock along side from which a pine tree 9 inches in diameter marked B. T. 1-1705 bears S. 77° West 39 feet distant; thence, first course S. 62° 30′ E., and 326.4 feet to corner No. 2 a slate rock 20 x 12 x 6 inches marked 2-1705, a mound of rock along side. Thence second course 33° 52′ W. 1,420.83 feet to corner No. 3, a slate rock 22 x 14 x 12 inches marked 3-1705, a mound of rock along side, from which the location corner bears 33° 52′ W. 159 feet, distant. Thence, third course, N. 62° 30′ W. 438.5 feet to corner No. 4, a slate rock 20 x 12 x 9 inches marked 4-1705, a mound of rock along side. Thence, fourth course, N. 38° 19′ E. 493.6
153 feet intersects S. W. end of line of survey No. 1089, the St. Louis Lode Claim, from which corner No. 3 of said claim,

bears S. 45° 30′ E. 68.5 feet distant, 660.6 feet to a point from which discovery shaft bears S. 72° E. 140 feet, distant 1,401.06 feet intersects the E. side line of said survey No. 1089. From which corner No. 2 of said claim bears S. 21° 15′ W. 545.58 feet distant 1437.6 feet to corner No. 1, the place of beginning; expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claim or survey No. 1089, and also all that portion of said Nine Hour vein or lode, and of all veins, lodes and ledges throughout their entire depth, the tops of apexes of which lie inside of such excluded ground. Said lot number 63 extending 1,420.83 feet in length along said Nine Hour vein or lode, the granted premises in said lot containing 10.42 of an acre of land, more or less, as represented by yellow shading on the following plat."

The plat referred to is herewith reproduced as follows:

(Here follows diagram marked p. 154.)



Scale of 200 feet to an inch

No. 402
Montana Co
v.
St Louis Co
} p. 154

155 Thereupon the defendant offered in evidence a duly certified copy of the original location notice of the Nine Hour lode introduced in the former trial of this case by the plaintiff and marked Plaintiff's Exhibit No. 3. To the receipt of which in evidence counsel for the plaintiff objected for the reason that said notice was irrelevant and immaterial. The Court having sustained the objection, the defendant duly excepted.

Defendant likewise called and had sworn one William F. Word, a witness in its behalf, who testified as follows:

WILLIAM F. WORD.

I reside in Helena, Montana, and am by occupation a mining engineer. I graduated at the University of Michigan in the class of '85 and for the last fifteen years I have followed mining in one form or another. I have examined mines, have mined, superintended mining operations in the vicinity of Marysville, and have been employed as an expert mining engineer in numerous law-suits. I have worked in similar mines in that vicinity. I have examined the surface of the St. Louis Lode Claim to ascertain the course or strike of its vein, and have been unable to find anything on the surface which would indicate that it passed through the end lines of the claim. I have examined the under-ground workings. The vein shown in the 65-foot shaft is plaintiff's discovery vein. This is the first vein you encounter on entering the tunnel, it has been followed by a
156 drift to the bottom of the discovery shaft. The vein is stoped out but clearly seen in the stope which is only about 30 feet high. The widest point in the vein is in the shaft about two feet. On the level in the face the vein is about 6 inches in width and dips slightly to the northwest. The dip of the vein from the Transcontinental tunnel to the 65-foot shaft is nearly vertical, but it has a slight dip to the northwest. It is about 170 feet between the two points mentioned. There is a small fissure having an almost vertical dip, showing in the southwest side of the Transcontinental tunnel near where the drift or opposite where the drift turns into the northeasterly fissure. It is about 9 or 10 feet outward from the point where the discovery vein meets the Transcontinental tunnel. Following along the Transcontinental tunnel about 90 feet from the point where the discovery vein meets it, we come to a drift on the vein to the southwest, this drift is what is marked on Plaintiff's Exhibit No. 1 as "Discovery." I examined to ascertain whether the two veins might have originally been one and faulted. I do not think they are one. I do not think there is any continuity or identity between them. The southerly one dips to the south, the other is nearly vertical. In addition to that, 30 feet further south the granite meets the slate on the right-hand side, and then 9 feet further on slate on the left-hand side of the tunnel. If these two veins had been one and faulted, in my opinion the slate and granite contact would have been faulted approximately the same as the vein. If there

had been a throw of 90 feet, it would mean that these two
157 veins were originally opposite each other and the ground had been moved up the hill or down the hill as the case might be. In that case there would be drag in there. There should be drag a short distance at each vein. This drag I failed to see. By drag, I mean a portion of the vein would be drawn into the Transcontinental fissure. I examined it carefully and could not find anything of the kind.

Richard M. Atwater was called and sworn as a witness for the defense and testified substantially as follows:

RICHARD M. ATWATER.

I reside in Helena, Montana. I am a mining engineer. I took the course of mining and engineering at the Royal School of Engineers in Berlin, Germany, graduating in 1894, since then I have been continuously engaged in the mining business in Europe, in South Africa, in Australia, in British Columbia and in the United States. I have visited the properties in controversy in this action during the last four weeks and spent considerable time there. I examined the surface of the St. Louis for the purpose of ascertaining the direction or strike of the discovery vein. I found nothing to indicate it on the surface. Entering the Transcontinental tunnel, the first cross-cut that you come to is on the discovery vein. It runs in a northeasterly direction and has been considerably worked. There are two levels, in all about 25 or 30 feet high. Beyond the discovery shaft, the lower level turns slightly more to the
158 east and extends for a matter of eighty feet beyond the discovery shaft. This part of the level has not been stoped, the walls can be seen and the back of the level. Just at the face a block of slate is seen on the eastern side, crossing the level diagonally. The vein at this point is smaller and less well defined than for a distance of 70 feet further back.

On the opposite side of the Transcontinental tunnel from the discovery vein can be seen a distinct fissure which shows as a wide crack in the wall, dipping slightly to the east from 3 to 6 inches, perfectly plain and well defined. It may be and it may not be the extension of the discovery vein. It is impossible to tell until it has been drifted on, but it may be. Proceeding in a southerly direction, the next thing we come to of importance is the drift to the south about 90 feet further in from the discovery drift. Just a little ways further in than the south drift, we come to the contact of the granite and the slate. On the western side that contract is about 15 feet from the south drift. On the opposite side of the tunnel, the granite and slate contact is about 15 feet further in. These contacts are small but are sufficient to be correlated. It is my opinion that these were one and the same contacts, but that they were cut off by the fault fissure, and would therefore constitute a measure of the throw of that fault. I infer that either the western side has slipped 15 feet to the north or that the eastern side has slipped 15 feet to the south.

Going back now to the point where the discovery vein reaches
159 the Transcontinental tunnel. If the fissure shown in the wall to the southwest is a continuation of the discovery vein, it would check up fairly well with the throw of 15 feet in the contact between the slates and granite which I have mentioned. This throw, if it occurred, would preclude the possibility of a 90-foot throw, as you cannot have a throw of 15 feet and another throw of 90 feet on the same fault with apparent parallelism of the various members in question. Furthermore, if these two drifts were on one and the same vein, before it was faulted, there would most certainly be dragged ore on each butt-end, showing the direction of the vein. That is the common way to find in which direction the vein has been faulted, and no such drag pieces are to be found in this case at either the butt-end of the discovery or the butt-end of the south drift.

If extended in its own direction, the discovery vein would cross the easterly boundary line of the St. Louis Claim between corners Nos. 1 and 2 at a point approximately 590 feet south of corner No. 1. I think the discovery vein is a very weak and irregular vein. I think the fissure is very likely caused by the Transcontinental fissure itself, and therefore it would only be a crack.

Cross-examination:

It is my opinion that the faulting movement shown in the Transcontinental tunnel could not have been for a distance of 90 feet because of the fact that the contact between the granite and the slate on the north side of the Transcontinental tunnel is only
160 15 feet distant from the contact on the south side, and therefore it would be impossible for the vein shown in the south drift to be the same vein disclosed in the north drift from the Transcontinental tunnel, and also from other facts which I have stated. If drag could be found along the fault fissure between the northerly and southerly drifts from the Transcontinental tunnel it would be strong evidence that the discovery vein has been faulted and a part of this vein is disclosed in the southerly drift. I spoke of a fissure from three to six inches wide showing on the south side of the Transcontinental tunnel nearly opposite the north drift, which I said might be a continuation of the discovery vein. I regard this as a weak fissure and do not believe that it would extend for any great distance. It is true that the Drumlummon fissure is only three inches wide in places and that this vein extends across the country for thousands of feet.

ALEXANDER BURRELL being recalled as a witness for the defendant, testified substantially as follows:

ALEXANDER BURRELL.

My first experience in quartz mining was in Leadville, Colorado, in 1880. I returned to Montana again in 1888 and since that time I have been engaged with the defendant company in various posi-

tions, more or less connected with mining, for the entire
161 period of seventeen years. I have been inside the Transcontinental tunnel from its mouth to its face and into the north drift to its face and southerly in the south drift to the working shaft of the St. Louis company. I have examined the north and south drift very closely and can see no evidence of what I would consider a fault or throw making these two drifts one vein. I think they are separate veins. On the southwest side of the Transcontinental tunnel near the level on the discovery vein there is a small gash vein that shows very plainly and is probably a continuation of that vein. During my development of the Drumlummon and the various mines connected with it I have driven out many small fissures in search of ore, and I have found a great many of them die out in the space of 20 or 30 feet. My opinion is that if this small fissure was driven out for a short distance, it would disappear. It might go 20 or it might go 100 feet.

The raise was made to the 85-foot level, and the excavation of Block 8 was made in November, 1898. After we had commenced work in Block 8 we were enjoined from further operation, and we stopped work upon service of the injunction order.

Thereupon the injunction order was identified by the witness, and was offered and received in evidence, and is as follows, to wit:

162 [Title of Court. Title of Cause.]

Provisonal Order of Injunction.

To The Montana Mining Company, Limited:

Upon reading and filing the complaint herein, duly verified, and the affidavit of William Mayger, on motion of Messrs. E. W. Toole and Thomas C. Bach, solicitors for the complainant.

It is ordered that you, the above-named defendant, Montana Mining Company, Limited, show cause before this court, at the courtroom, in the Gold Block, in the City of Helena, County of Lewis and Clarke, State of Montana, on the 26th day of November, 1898, at 10 o'clock A. M., why a preliminary injunction should not be granted in said suit restraining you from further prosecuting any work or extracting any ore or other material from the vein, lode or ledge situated on the St. Louis Lode Mining Claim, in the Ottawa Mining District, in the County of Lewis and Clarke, and State of Montana, and particularly described in said bill of complaint as follows, to wit::

Commencing at a projected parallel and line of said St. Louis quartz lode mining claim, at a point on the east side line thereof, between corners 1 and 2, extended vertically downward, whereat it passes through the hanging-wall of said vein, lode or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis quartz lode mining claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging-wall is dis-
163 closed at the surface by an upraise at said projected parallel end line, five feet west of the east side line of said St. Louis

quartz lode mining claim; then from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis quartz lode mining claim between corners 1 and 2, with the west line of the thirty-foot strip described in the complaint herein; thence south fifty degrees fifty minutes west 108 feet and along the west line of the said thirty-foot strip to a projected parallel end line of said St. Louis quartz lode mining claim, extended vertically downward which passes through the hanging-wall of said vein at the surface and at the crossing of the said hanging-wall with the west line of the said thirty-foot strip.

And it is further ordered by the Court that you and each of you, your agents, servants and employees be in the meantime restrained and forbidden from further extracting or removing any ore or other material from the said premises, or disposing of, treating or reducing any ores by you heretofore removed or extracted from said premises.

Dated Helena, Montana, November 19th, 1898.

HIRAM KNOWLES, *Judge.*

164 [Endorsed:] Title of Court. Title of Cause. Provisional Order of Injunction. Original. Filed and entered Nov. 23, 1898. Geo. W. Sproule, Clerk.

The order subsequently made modifying the temporary injunction was also read in evidence, and is as follows, to wit:

[Title of Court, Title of Cause.]

Order Modifying Temporary Injunction.

This cause coming on this day to be heard upon the application of defendant for a modification of the temporary injunction order heretofore issued in the said cause, so as to permit the timbering of a drift run by defendant into what is known as the compromise ground at the bottom of the plaintiff's winze near its 85-foot level, and also, so as to permit the defendant to remove and store the ore taken from the said compromise ground now in the defendant's chutes, supported by the affidavit of William M. Philpotts, and it appearing therefrom that the modification asked for should be granted, and everything being fully understood and considered;

Now, therefore, it is ordered and decreed that the said temporary injunction order heretofore issued in the said cause on November 19th, 1898, be and the same is hereby modified so as to permit the said defendant company to timber in a good and substantial manner the drift run by the said defendant for a distance of about 28 feet southerly from the south end of plaintiff's winze at or near its 85-foot level, so as to prevent the hanging-wall of the vein at
165 said point from caving in, and to preserve the said drift from injury from caving.

And it is further ordered that the said injunction order be further modified so as to permit the defendant company to remove from the chutes running from the above-described drift down to defendant's 400-foot level, the ore now contained therein as set forth in said affidavit, and to store the same in a safe and convenient place where the same shall be always subject to the further order of this Court, and that upon removing the said ore the defendant shall file with the clerk of this court a true and correct statement of the amount of ore so removed, and the place where the same is stored.

It is further ordered that the said temporary injunction order subject to the foregoing modification be and the same is hereby continued in force until the further order of this Court.

Dated November 26th, 1898.

HIRAM KNOWLES, *Judge.*

[Endorsed:] Title of Court. Title of Cause. Order Modifying Temporary Injunction. Filed and entered Nov. 26, 1898. Geo. W. Sproule, Clerk.

The affidavit of William Philpotts, upon which said modification was made, was also read in evidence, and is as follows, to wit:

166 [Title of Court, Title of Cause.]

Affidavit of William Philpotts.

UNITED STATES OF AMERICA, *District of Montana, ss:*

William M. Philpotts, being first duly sworn says: I am over the age of twenty-one years. I am at present employed as mine superintendent of the above-named defendant, and I have been employed by said defendant for about four and one-half years in said capacity, and as assistant engineer. I am well acquainted with the working done by said defendant on the Compromise ground and on the Nine Hour Claim east of said Compromise ground, the said defendant has recently made an upraise from its 190-foot level on the Nine Hour claim to the bottom of the plaintiff's winze at or near its 85-foot level and from the south end of said winze it has run a large drift southerly in the said compromise ground, for a distance of about 28 feet. That said upraise starts on the said 190-foot level at a point about 15 feet east of the east side line of the compromise ground and runs thence through Nine Hour ground a distance of about the same number of feet before passing into the compromise ground, and from the point last named it is run wholly within the compromise ground. That the drift above mentioned is likewise wholly within the compromise ground, and from its commencement is north of the projected end line of plaintiff's said St. Louis claim as defined by the temporary injunction and the affidavit upon which the same
167 is based; that the ground in said drift is of a soft and pliable nature, readily yielding to slaking by the action of the

atmosphere; that by the service of said injunction the defendant was prevented from timbering said drift, which is absolutely necessary to preserve said drift and prevent the loss of large quantities of the ore therein contained. That the hanging-wall of the vein at said point would, if a cave occurred, fall with the ore and thereby seriously impair the grade of the ore, wherefore affiant says that defendant is likely to sustain great and irreparable injury if said injunction is not so modified as to permit it to timber said drift so to protect the same. That the timbers therefor are provided and on the ground, and it will not take more than three or four days to put them in place.

And affiant further says that in taking ore from the said drift, it passes through a chute from said drift, down said upraise to the 370-foot level in defendant's Nine Hour ground; thence it is trammed a distance of about 100 feet to a chute leading to what is known as defendant's 320-foot level; from the point where said chute reaches said level, it is trammed a distance of about thirty feet to a chute leading to the 220 level; and thence it is trammed a distance of about sixty feet to a chute leading to the 400-foot level, from which last point it is trammed to defendant's mills; that at the time of the service of said injunction the chutes above named all contained ore taken from said compromise ground. Affiant says he is a

168 civil engineer by profession, that he is well acquainted with where the lines of said compromise ground would fall in all of the workings of said defendant under ground, and knows as mine superintendent from what point the ore came which is now in said chutes, that there is not one pound of ore therein which did not come from said compromise ground, but the same all came from the drift above mentioned and described. That owing to the fact that said upraise reaches the bottom of plaintiff's winze, there is a strong circulation of cold air through said opening, and in the vicinity of said chute, which will freeze the ore contained therein into a solid mass, if allowed to remain therein without being disturbed for any considerable length of time, and if said ore is once frozen in said chutes, it will probably involve the destruction of said chutes in order to get it out, and new chutes will have to be constructed at great expense to defendant company in order to continue mining from said compromise ground, and defendant would otherwise be greatly injured and damaged thereby.

And affiant further says that he is well acquainted with the financial condition of the said plaintiff, and knows that it is insolvent, and that wages due to its late employees are due and that they have no means of recovering the same, and that the said plaintiff company has neither property or credit out of which any judgment for damages could be made.

And affiant further says that the temporary injunction

169 heretofore granted should be further modified so as to permit the defendant company to remove the said ore from said chutes, and store the same in some safe place until the hearing of plaintiff's motion for a temporary injunction, or if worked, that

defendant keep careful account of the same and the proceeds thereof and account for the same as may hereafter be directed by the Court.

That affiant is well acquainted with the financial condition of the said defendant, and that it is able to respond in damages to said plaintiff in many times the value of the ore now in said chutes, and further affiant sayeth not.

W. M. PHILPOTTS.

Subscribed and sworn to before me this 24th day of November, A. D. 1898.

[NOTARIAL SEAL.] W. E. CULLEN, JR.,
Notary Public in and for Lewis and Clarke County, Montana.

[Endorsed:] Title of Court. Title of Cause. Affidavit of William M. Philpotts. Filed Nov. 26, 1898. Geo. W. Sproule, Clerk.

The witness continued: There were 60 or 61 tons of ore taken out of this upraise, which ore is now stored in the yards of the Montana Mining Company subject to the order of this Court. About 40 tons of the ore that was taken out of Block No. 8 was milled and the remaining tons are in the raise above the 190-foot level. There must be 65 or 70 tons in the raise.

170 I am the Alexander Burrell who was named as one of the defendants in this case when it was first brought, and the same person named as Alexander Burrell in the original complaint. At the time of the service of the summons, I resided at Marysville, Montana. I know Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell and Thomas Hawkins. They all resided at Marysville, Montana, at the time of the service of the summons in this case.

Cross-examination:

Some of the ore taken out between the 108 and 133-foot planes was shipped to the smelter. It is true that high grade ore was often mixed with the low grade ore in order to keep up the average of the mine. The ore from Block 8, which was taken out after the modification of the injunction order, was taken down to the 190-foot level and from the 190-foot level to the 400. This ore was put in the chutes with other ore. All of the ore in the chutes was taken out together.

In Rebuttal.

JOHN R. PARKS testified as follows: Assuming that the movement along the fault fissure disclosed in the Transcontinental tunnel had displaced the contact between the granite and the slate for a distance of 15 feet, I would still say that this fault fissure has caused a throw of 90 feet in the discovery vein. I have made a little model to explain the geology of that. (Model produced and ex-

171 planation made to the jury.) There are workings below the Transcontinental tunnel along the fault fissure. There is one 50 feet below, one 150 feet below, and one 250 feet below. These

levels are now and for some time have been inaccessible. There is a drag shown in all of the three drifts along the Transcontinental fissure below what is known as the Transcontinental tunnel. Down at the bottom there is unmistakable drag from the fissure in the north drift to the fissure in the south drift. As we go down in the lower workings the space diminishes between the north and south veins. Blocks 4 and 9 have been stoped out. I was in the stopes and surveyed the same and from this survey determined the cubical contents.

CHARLES MAYGER testified that Blocks 4 and 9 had been stoped out; that he had taken out the lagging on the north side of the Montana company's apex shaft above the twenty-foot level and found broken timbers and coved ground along where Block 9 was taken out.

WILLIAM MAYGER, recalled as a witness for plaintiff, in rebuttal, testified that the ore taken from Blocks 8 and 11, and all of the blocks between the 133-foot plane and the 108-foot plane, outside of the ores that were taken in 1893, were all mixed together promiscuously from the 190-foot level to the 400; that on the discovery vein of the St. Louis Claim there is a level running southerly
172 from the Transcontinental tunnel to within 95 feet of the south end line. There is another level 50 feet below that extends probably 200 feet from the Transcontinental tunnel and another level 150 feet below the Transcontinental tunnel that runs southerly probably 350 feet. There is also the 250-foot level. There is a working along the line of the fault fissure 250 feet below the Transcontinental tunnel. There is another working along the fault fissure 150 feet below. In that working there is a great deal of drag shown along the fault fissure between the northerly and the southerly sections of the discovery vein. There is also drag on every level. The Transcontinental tunnel is closely timbered on top, and for this reason the drag cannot be seen in that tunnel. I mean by drag, broken up quartz that has been rolled until its edges are worn. It is quartz that is not in place. This drag shown along the fault fissure is mineralized. The St. Louis company obtained an injunction preventing the defendant from sinking its apex shaft. The apex shaft had been sunk about 35 feet. After this injunction was obtained the defendant commenced stoping, and it was necessary to procure a second injunction. The sampling done by Mr. Hand was not specifically for value, but for the purpose of determining the width of the vein and the apex of the vein. I know that Mr. Hand went to Blocks 4 and 9. I went with him.

The foregoing contains a statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tends to preju-
173 dice the rights of the defendant.

And thereupon the evidence being closed, the defendant moved the Court in writing to direct the jury to return a verdict in favor of the defendant. Said motion is as follows, to wit:

[Title of Court, Title of Cause.]

Motion for Verdict.

Now comes the defendant, at the close of all the evidence, and moves the Court to direct a verdict in its favor, and against the plaintiff, on the following grounds, to wit:

1. The pleadings do not allege that the discovery vein of the St. Louis passes out through either end line, and there is no foundation for the introduction of evidence upon that issue, and without that issue proven there can be no extralateral right and no recovery.

2. There is no sufficient evidence that the discovery vein of the St. Louis in fact passes through either end line, and therefore the plaintiff has proven no right to any of the ores claimed in this action.

3. The plaintiff alleges in its complaint that the hanging-wall and the foot-wall of the Drumlummon vein on the south end, each pass out through the side line, and that the hanging-wall of the same vein passes through another side line in departing on the north end. Such a vein can have no extralateral rights; and as all the extraction involved in this section is outside of the vertical plans of the St. Louis side line, plaintiff cannot recover.

174 4. The evidence fairly shows that no part of the Drumlummon vein apex cuts either end line of the St. Louis, and therefore plaintiff has shown no rights to any of the ores involved in this action.

5. The decree in the specific performance suit, in evidence in this case, is a final judgment, perpetually enjoining plaintiff from ever asserting its possession or right of possession in any part of the premises known as the compromise strip, and as this action of trespass can only be maintained when there is possession or right of possession, the said decree is a perpetual bar to this suit.

6. The said decree, and the bond on which it is based, each serve to create of the west side line of the compromise strip a vertical common-law bounding plane, and to pass all minerals contained beneath the surface of said strip; and the plaintiff in the excepting portion of the premises described in the complaint expressly disclaimed any interest in the mineral therein contained.

7. The said decree and said bond granted to defendant's predecessor all the minerals beneath the surface of the vertical planes from the surface boundaries of said strip.

8. The plaintiff has failed to show the tonnage value of the ore extracted before the commencement of this action, and under the evidence there could be no finding of the amount or value thereof, and for ore extracted after the commencement of this action, there can be no recovery in this suit.

W. E. CULLEN AND
W. E. CULLEN, JR., AND
WM. WALLACE, JR.,
Attorneys for Defendant.

175 [Endorsed:] Title of Court and Title of Cause. Motion for Verdict. Filed June 30th, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

But the Court denied said motion and refused to so instruct the jury.

To which said ruling of the Court and to its refusal to give the jury such instruction, the defendant then and there duly excepted, and excepted to such refusal of the Court upon every specific ground in said motion contained.

Whereupon counsel for the plaintiff moved the Court for leave to amend the *ad damnum* clause of their complaint so as to change the $50,000.00 therein mentioned to $400,000.00, making the entire claim for damages $600,000.00.

To which amendment the defendant objected as follows:

By Mr. WALLACE: Upon the statement of counsel in open court that his proposed amendment is to change the word fifty in the supplemental damage paragraph of the complaint to four hundred, and to change the words two hundred and fifty in the prayer, to six hundred, the defendant interposes the following objections to the application of plaintiff to make the amendment in question:

First. Because there is no showing of merits to warrant such amendment.

Second. Because the right to make the amendment is barred by lapse of time.

Third. Because the right never existed to make such an amendment in this cause of action for the reason that the effect
176 would be to increase the amount claimed in the supplemental portion of the complaint, between the period since the commencement of the action and the present trial. And that the law forbids the recovery in this kind of action of any damages save those damages resulting from acts of trespass committed prior to the commencement of the suit itself, and there has been no waiver of this unless it be as to the $50,000 plead as supplemental damages by the amended complaints of November 21st, 1898, and June, 1899.

Fourth. There can be no recovery of damages resulting from extraction from the Drumlummon vein since September 16th, 1893, and as the effect of the proposed amendment is simply to change the amount of damage alleged to have happened from extraction since that date the amendment would be unavailing and would allege damage within a period as to which the law will permit no recovery in this action.

Fifth. There is no testimony in the case showing or tending to show that the damage, if any, exceeds the sum of $276,000.00.

Sixth. That objections to the proof as to quantity in block and as to value as not justified by the pleadings were severally reserved at the time the proof was offered by the plaintiff, such objections and exceptions being taken upon the part of the defendant as to each block within planes 108 and 133 and as to each block shown by their testimony to have been extracted since September 16th, 1893, and

such objections and exceptions being taken at the time
177 severally that the proof was offered as to each block, whether on the part of the witness Mayger or the witness Parks.

But the Court overruled each and every of said objections and allowed the amendment of said complaint to be made.

To which ruling of the Court the defendant then and there duly excepted.

Thereupon plaintiff having introduced its proof in rebuttal and rested, and after argument of counsel, the Court instructed the jury in writing as follows, to wit:

[Title of Court, Title of Cause.]

Instructions to Jury.

GENTLEMEN OF THE JURY:

To those whose pursuits in life may have been wholly aside from theoretical or practical mining, it is a complicated task to follow testimony with comprehension, through several weeks, where geologists and expert mining men are the principal witnesses, and scientific truths are involved in the trial. But I have observed that you have given very close attention to the witnesses, prompted, I am sure, by a conscientious desire to remember what they say, to understand their explanations, and to weigh their statements carefully and well.

A case like this is unusual in its importance. Sufficient allusion to its history has been made to disclose to you that it is a great legal battle, which has continued for many years, waged on the respective sides by counsel eminent for their learning in the law, who have been fighting for their clients with unflagging industry and
178 skill; all earnest in their views of the law, and each side strong in the assertion of the existence of facts upon which it bases its claims for a verdict and judgment. As jurors, it must have been interesting to you to watch the progress of such a trial, impressed with the fact that you constitute a vital part in the conduct of the litigation. Being impartial men sworn to bring in a true verdict according to the evidence, you are now about to approach the concluding act of your duty by weighing all the evidence, applying the law to it, disregarding extraneous matters not justified by the evidence, and thereafter stating your conclusions, upon which will rest the judgment of the Court and its ultimate determination of the rights of these parties.

In the courts of the United States, the Judge presiding at a trial is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinions upon the questions of fact, which he submits to their determination; yet you must understand that you and not the Court, are to decide the facts. I leave the facts in unequivocal terms to your judgment as within your true and peculiar province.

By consent of the parties and the Court, you have inspected the actual present physical conditions. This will doubtless enable you

to understand the situation more vividly that you otherwise could, and help you in weighing the evidence in its exact application to the whole case; and now that the testimony is concluded, and the arguments of counsel have been made, it becomes proper for the Court to charge you upon those principles and rules of law which
179 are pertinent to the issues and which must govern in your deliberations.

The action is brought by the St. Louis Mining & Milling Company against The Montana Mining Company, Limited, to recover damages for an alleged trespass. The plaintiff, in its complaint, alleges the corporate character of the parties interested in this suit; the ownership of the St. Louis quartz lode mining claim; setting forth a description thereof; that the discovery, location and patent of the St. Louis mining claim was prior to the discovery, location and patent of the Nine Hour quartz lode mining claim; that the apex of the Drumlummon vein is within the surface boundaries of the St. Louis quartz lode mining claim, between the 520 and 133-foot planes, specified in the complaint; and that the plaintiff has a right to follow said vein on its dip to its outermost depth, even though in its downward course it should pass beyond the vertical plane of its side lines. It further alleges that the defendant has entered upon that part of the said Drumlummon vein which has its apex between the two planes aforesaid, and extracted ore therefrom of the value of six hundred thousand dollars.

Defendant, in its answer, admits the corporate character of the parties, the ownership of the St. Louis quartz Lode Mining Claim, as alleged in the complaint, and that the discovery, location and patent thereof were prior to the discovery, location and patent of the Nine Hour Quartz Lode Mining Claim, owned by the defendant; and then denies generally each and every other allegation of the complaint. The defendant's answer then contains
180 affirmative allegations which are not important in this trial and therefore no further reference is made thereto.

1. The term vein, lead, lode and ledge all mean the same thing. A vein may be said to be a seam or fissure in the earth's crust filled with quartz or some other kind of rock in place, carrying gold, silver or other valuable mineral deposits named in the statutes of the United States. It is whatever the miner would follow expecting to find ore, some formation within which he would expect to find ore, outside of which he would not expect to do so. The miners thus make the definitions of a vein. Geological opinions and definitions are not conclusive upon you as to the nature, element or width of a vein or its apex. The law has defined each, and the definitions of the law are controlling, as given you in these instructions. Judge Hawley, United States Judge from Nevada, in defining lodes and veins said; "To constitute a vein it is not absolutely necessary that there should be a clean fissure filled with mineral, but it may and does exist when filled in places with other matter. The fissure should, of course, have form and be well defined, with hanging and foot-walls. Between these walls will be found bodies of quartz, rich or poor, but there is also liable to be found in many

places short or long distance between the quartz bodies or pay chutes where no quartz will be found in the fissure between the walls. Yet the vein exists, and is often as well defined as if the same was filled with quartz. The clay, the selvages, slickensides, striation, and ribbing of the walls are frequently as strong evidence of the
181 indication of permanency and continuity as the existence of the quartz itself."

2. The apex of the vein may be said to be the top of the vein at the point where it comes nearest the surface of the earth, the entire top of the vein between the two walls thereof, which comes nearest the surface of the earth.

3. At common law, which is the law we inherited from our ancestors, whoever owns surface of the earth, owns all beneath the surface, that lies within its boundary lines drawn downward vertically. This is still the law as to all classes of land except mineral land. If you make a homestead entry of public land, or enter it under any of the other public land laws of the United States, except the mineral land act, the government grants you title, not only to the surface, but to everything beneath the surface. For example, if you had entered in good faith a piece of agricultural land and obtained a United States patent for it, if afterward there was discovered within its surface boundaries, by yourself or anybody else, a mine, it would be absolutely yours, and no one could interfere with your working it, or mining it to any extent you might desire, so long as your work did not extend outside of the surface lines of your land extended downward vertically, but you could not follow the vein or pay streak beyond your surface boundaries without becoming a trespasser. Since the passage of the mineral land act, when a mining claim is entered under its provisions, and a patent issued for it, it contains two features at variance with this common law right, which I have explained to you.

182 First. The patentee may follow, on its dip, any vein or lode, the top or apex of which may be found within its surface boundaries, to any depth, though on its course downward into the earth, it departs so far from the perpendicular as to pass out of his own ground through a side line of his claim projected downward vertically, and into the territory of his neighbor, and, secondly, it reserves to the adjoining claim owner the right to follow his lode, into and under the mining claim thus granted in the same manner. Thus a patent for a mining claim contains a grant and a reservation, neither of which is to be found in the patent for agricultural land. This is the extralateral right already referred to.

The extralateral right, thus conferred upon the patentee of a mining claim, can only be exercised in one way. Having the top or apex of the vein within the surface boundary of his own claim he must follow it down on its dip into the territory of his neighbor. He may not go upon his neighbor's claim and sink a vertical or other sort of a shaft down to the ore he claims, nor may he, by running a tunnel into or through or partly through his neighbor's claim reach the ore body claimed by him. If from lack of continuity of the vein, or from any other cause, he cannot follow the ore in

on its dip, from its top or apex on his own ground, down into his neighbor's mining claim, then such extralateral right is lost to him, and the ore lying within the adjoining claim becomes the property of the owner of such claim, under the doctrine of the common law, which I have just explained to you.

183 4. The plaintiff claims extralateral rights on lode or vein which it alleges enters its St. Louis claim at what it terms its 520-foot plane, which is an imaginary line, if drawn down at a point 520 feet southerly from corner No. 1 of its claim, parallel to a line which it terms its end line, and which bounds its rights in a northerly direction. This vein, which in the evidence is generally termed the Drumlummon vein, traverses its claim in a southerly direction, passing out of its said claim through the westerly boundary line of the compromise ground, at what it terms its 133-foot plane, which is likewise an imaginary line parallel to what it terms its end lines and drawn down to the eastward on the Drumlummon vein on its dip. It claims that it has a top or apex, or a portion of the top or apex of this vein within the surface boundaries of its said St. Louis claim, and that therefore it has the right, under the mineral land act of the United States, to follow this vein down on its dip, though it passes through its easterly boundary line and into and under the mining claim of the defendant, known as the Nine Hour Claim. It is further claimed on the part of the plaintiff that the defendant has taken, carried away and converted to its own use, a large amount of ore, which was situated in the vein beneath the surface of its ground at points where the apex of the vein was within plaintiff's ground, and for this alleged trespass, the plaintiff claims damages. Now, as I have said, the owner of a mining claim is entitled to follow his discovery vein on its dip into the earth, though it may extend outside of the vertical side lines of his location and into the territory of his neigh-

184 bor. This is called the extralateral rights. He also has the right to pursue any other lode or vein, having its top or apex within the surface boundaries of his claim, to the same extent and in the same direction, as he may pursue his discovery vein. Suppose, for example, that the plaintiff has satisfied you that it has within the boundaries of its St. Louis claim, a discovery vein running generally in a northerly and southerly direction extending through the ground, included within the surface boundaries, and that the dip of this vein is to the east, then it would be entitled to follow this vein into and under the Nine Hour Claim, if following it on its dip, it extended so far. It would likewise be entitled to follow the Drumlummon vein on its dip for so much of the distance as the top or apex of that vein is found within the surface boundaries of the St. Louis Claim, as the plaintiff is entitled to extralateral rights on its discovery vein, as herein stated, and it would be entitled to all ore found within said Drumlummon vein for such distance, even though the same were under the Nine Hour surface lines.

5. The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein

in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this *prima facie*
185 case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights.

6. Your first duty therefore is to examine and ascertain what, if any, extralateral rights attach to the discovery vein of the St. Louis Claim, and the plaintiff's extralateral rights on the Drumlummon vein, between the said planes, is controlled by its extralateral rights on its original or discovery vein.

7. It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis Quartz Lode Mining Claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence; but the defendant insists that the St. Louis Quartz Lode Mining Claim is not entitled to extralateral rights on the Drumlummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary or incidental vein of the St. Louis Claim. Under the statutes of the United States, the locators of a mining claim have the exclusive right of possession and enjoyment of all the surface included within the lines of their location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such vein, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location. These extralateral rights, under decisions of the Supreme Court of
186 the United States, as to the secondary or incidental veins, are the same as those given by the statute upon original or discovery veins; and if, therefore, plaintiff had extralateral rights upon its discovery vein, including that portion of the St. Louis Claim within the above planes in which is found the apex of the Drumlummon vein, so called, then plaintiff has extralateral rights upon that part of the Drumlummon vein. Plaintiff claims that the original or discovery vein of the St. Louis Claim runs through the earth beneath the surface of said claim in the general course of the side lines of said claim.

If you find from the evidence that the original or discovery vein of the St. Louis Claim, on its course or strike, passes through the earth within the limits of its surface boundaries, between the 520 and 133-foot planes, on a general course lengthwise of the claim, then plaintiff has extralateral rights to such parts of the original discovery vein between said planes, and would have corresponding extralateral rights upon any secondary or incidental veins having their apices in the St. Louis Claim within said planes.

8. If you find that the course or strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or

elsewhere, is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location.

And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extralateral rights on that
187 part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis claim, between the 520 and 133-foot planes, that the discovery vein of the St. Louis Claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis claim between such planes generally lengthwise of the claim.

9. And if you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) runs lengthwise of the St. Louis claim between its side lines, and extends from the 520 to the 33-foot plane, and dips easterly, then plaintiffs would be entitled to extralateral rights for that vein (or those veins) and to the like extralateral rights for all other veins having their apices within the same limits, and running in the same general direction.

10. Should you determine that the plaintiff by virtue of its ownership of the St. Louis Quartz Lode Mining Claim, has extralateral rights to the Drumlummon vein, so called, between the 520 and 133-foot planes, the next question for your consideration is the amount of ore extracted from said St. Louis Mining Claim by the defendant herein. This is purely a question of fact, which you must decide from the preponderance of the evidence introduced before you by the respective parties and the presumption as herein stated. You must find from said evidence the amount of ore extracted from said Drumlummon lode by the defendant, and I charge you, as a matter of law, that defendant is liable to the plaintiff for the
188 value of such ore to the extent and for the amount hereinafter stated.

11. There are two rules established and adopted by the federal and other courts of the United States with reference to the measure of damages in cases of this kind, and which rule applies, depends upon whether or not the trespass under which the ore was extracted was willfully committed or done in good faith. If you find from the evidence that the defendant entered on that part of the said Drumlummon vein which apexes in the St. Louis Quartz Lode Mining Claim, between the planes aforesaid, and extracted the said ore therefrom willfully, recklessly and with knowledge that said vein did apex within the St. Louis claim, then your verdict must be for the value of the ore which you must determine from the evidence introduced. If, however, the defendant had sufficient reason to believe, and did honestly believe at the time it entered upon said vein and extracted and removed said ore, that the same belonged to said defendant and not to the plaintiff, and that it had lawful right and authority to extract and remove the same, then the trespass was not willful, and the plaintiff is entitled to the value of the ore, subject

to the deduction for the reasonable cost of mining said ore, hoisting the same to the surface, and transporting the same to reduction works, and the reasonable cost of such reduction. The actual cost to defendant of all, or any of these items is not conclusive upon the value thereof. Defendant is not entitled to reduce the value of the ore by any sum greater than the reasonable value of the items
189 above mentioned, and you must determine such reasonable value from the evidence given in the case. In determining the character of the trespass, you have the right to disregard all testimony given by the defendant tending to establish good faith, if, in your judgment, the action of the defendant discloses to your satisfaction that the claim of defendant, that it acted under an honest belief that it owned the ore in question and had the right to remove it, was merely for the purpose of reducing the damages which it would have to pay for such ore upon a suit to recover the value thereof by this plaintiff, and find that the action of defendant in extracting and removing the ore in question was willful.

12. In determining the question of the good faith of defendant in extracting and removing the ore in question, you are entitled to consider all the facts and circumstances shown by the evidence; if you find that the defendant acted under an honest belief that it was the owner of the ore in the disputed ground, and had good right and lawful authority to extract the same, and that such belief was based upon such facts and circumstances as that you believe that an ordinary man, acting as you find the defendant acted, would have had the honest belief that he owned such ore and had a right to remove it, then the trespass was not willful.

13. The advice of counsel is admissible for the purpose of showing good faith and innocent intention on the part of the person who acts under it, but to be of avail for that purpose it must appear in the evidence that the party who relied upon the advice had made
190 a fair and full statement of all the facts concerning the point upon which the advice was given, to its counsel. If all the material facts were known to the client and not disclosed to the counsel, the advice would not sufficiently show good faith; and if the parties seeking the advice knew that such advice was incorrect, such advice should not be considered as sufficient upon the question of the good faith of the party.

14. The burden of proof is upon the plaintiff to show by a preponderance of evidence, its ownership, the amount of ore extracted and its value; and in arriving at a verdict you are to take into consideration all of the circumstances and facts presented by the evidence in the case. However, if you are satisfied that the plaintiff has shown its ownership and given evidence tending to show the amount of ore extracted and the value thereof, the burden is upon the defendant to show, if it can, that the trespass complained of was not willful. A presumption arises from the extraction of the ore from a vein which has its apex within the plaintiff's claim, by the defendant, that the trespass was willful, and that the defendant is liable for the value of the ore taken from the mine. This presumption is, however, disputable, and the burden is upon the de-

fendant to show in mitigation of damages that it was not a willful trespasser, and thus be relieved from the payment of the value of the ore stated in other instructions herewith given to you.

15. If you find that the defendant has prevented the plaintiff from ascertaining the exact amount of the ore or its value, by extracting and removing the same, or has placed it beyond the power of the plaintiff to make such proof certain and specific, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by his conduct by making every reasonable intendment against him in favor of the party injured.

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16. In estimating the damages to the plaintiff, if you find from the evidence that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by extracting the greater part of the ore, or all of the valuable ore in any particular places of the mine, or by mixing the ore taken from plaintiff's ground with ore of less value, belonging to defendant, or with any other material taken from any other places in the mine, then the jury, in determining the value of the ore taken, are at liberty to consider the highest value of ore found in the vicinity of the ore extracted.

17. If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use, quartz, rock and ore within the planes described in the complaint, from said vein, lead or lode, belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass, cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injuries it has sustained.

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18. The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the money expended in the running of levels, sinking of shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant or any salaries paid to its officers, or any wages to any persons except those actually employed and engaged in extraction, transportation and milling of the ores in question.

19. When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered

under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same
193 as though it was a trespass upon said claim within its surface boundaries. And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis claim and the ore extracted therefrom.

20. If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and 133-foot planes, and the value thereof, and that it did not do so, but took away from the plaintiff the means of providing the true and correct amount and value thereof, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by the misconduct of the defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find the facts as above indicated, you are at liberty to follow the evidence given in behalf of plaintiff as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence.

21. As to the evidence disclosed by the books of defendant and the abstract thereof offered in evidence in behalf of the defendant, I charge you that to entitle them to be considered as sufficient
194 evidence to prove the value of the ore extracted from the Drumlummon vein, you must be satisfied that the ores taken from other parts of defendant's mine which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition.

22. In considering the weight to be given such books and abstracts of the defendant company, in determining the reasonable cost of the mining, hoisting, transportation and milling of the ore, you should be satisfied that the ore from other parts of the defendant's mine, mixed with the ores extracted from the plaintiff's vein, if you find such to be the fact, were substantially the same class or kind or ores; that it was mined for substantially the same cost as the ore of plaintiff; that it was hoisted and transported to the mill at substantially the same cost, and that it was of the same general character as plaintiff's ore, and would mill as easily and successfully and at the same general cost.

23. The law is well settled that if one willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value *of* which the property in question can be reasonably estimated.

24. It is a principle of law that if weaker and less satis-
195 factory evidence is offered by a party, when it appears that stronger and more satisfactory evidence was within the power of that party to furnish, the evidence of a weaker nature will be viewed with distrust. You will apply this principle in determining the weight of the evidence before you upon all issues in support of which you find that either party had power to furnish stronger evidence and more satisfactory evidence than it has introduced upon such issue.

25. When you are told in this charge that the burden of proof upon any issue is upon either party to this action, you are to understand that such party must present evidence for your consideration which preponderates over the evidence of the other party upon that issue; and if, after due consideration of all the evidence introduced by the party having the burden of proof, it does not preponderate in his favor, but that the evidence of each party upon the issue is equal, in your judgment, it is your duty to find such issue against the party having the burden of proof, under these instructions. In determining the weight of the evidence you are not to consider alone the number of witnesses which have been sworn in behalf of either party, but to take into consideration the circumstances under which the evidence was given, the character and standing of the witnesses, their appearance upon the witness stand, and all the circumstances of their evidence, and after such consideration, you are to determine the weight and preponderance of the evidence upon each issue in favor of one or the other of the parties to this suit.

26. The plaintiff, in case the jury find a verdict in its
196 favor, is entitled to interest upon the amount found by the jury, from the date of the conversion of the ore by the defendant to the date of the rendition of the verdict by the jury, at the rate of eight per cent. per annum. If you cannot determine the dates of conversion of the ores, by the defendant, the plaintiff is entitled to recover interest on the value of the ores extracted, as found by you, from the date of the filing of the amended and supplemental complaint herein, on the 26th day of June, 1899. And you should add such interest to the amount which you find to be the value of the ore extracted, for which defendant is liable to plaintiff as damages, and return the same as a part of your verdict.

27. The presumption that a witness speaks the truth may be repelled and the witness held to be impeached by the manner in which he testifies, by the character of his testimony, by evidence affecting his character for truth, honesty, or integrity, or his motive, or by contradictory evidence, or by statements made out of court not in accordance with his testimony upon the witness stand. The jury are the exclusive judges of the credibility of each and all the witnesses and the weight or value to be attached to the testimony of each witness.

28. There can be no recovery in this action for ores extracted after June 26th, 1899.

29. There is also in issue between plaintiff and defendant as to what number of cubic feet should be used in determining the number

of tons, after you have computed the cubic contents of any given block or blocks. On this issue the burden is on the plaintiff,
197 and you will consider the whole evidence and use such a number of cubic feet per ton as in your good judgment, under all the evidence, would fairly represent a ton in weight of the particular ore involved. This may follow in different blocks if the ore varies in weight, and having determined this number of cubic feet per ton of any number of blocks, you will apply the same in determining the tonnage of the cubical contents for the purpose of fixing the value thereof.

30. The width of the ore extracted with the thickness thereof, is one of the material questions in this case, as to any block or blocks, you will carefully consider the evidence offered and the probable width thereof; and you will determine such width by the preponderance of the evidence upon that issue; and when you have determined it, you will apply this width, and no other, to the block or blocks as to which you find it to represent the true width of the ore extracted.

31. As to blocks 4 and 9, the defendant denies that they were ever extracted except the lower portion thereof, represented by the 18-foot level of the St. Louis company; and as to such portion, insists that they were extracted by plaintiff company. If you find they were not extracted by the defendant, then, of course, plaintiff is not entitled to recover for the value of the ore therein contained. If you are satisfied that the blocks 4 and 9 were extracted by the defendant, and that the plaintiff extracted the ore in the 18-foot level, you will award the plaintiff damages for the value of the ore extracted
198 by the defendant, and not that extracted by the plaintiff. But if you believe from the evidence that the 18-foot level to the extent that it underlines blocks 4 and 9 were all extracted by the defendant, then you should return damages to the plaintiff for the value of the ore so extracted to be determined by the other instructions in this case.

32. In considering any ore extracted from Block 8, part of which was removed under the authority of this Court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed, you should make a deduction in accordance with the general rule laid down in the charge.

33. As to the Parks samples, taken in July, 1899, which form the basis of his evidence as to the value, I advise you that they are not in any sense to be treated by you as taken either by the consent or the procurement of the defendant; and any evidence as to inquiries by Parks or Philpotts, or any one else present, to such alleged inquiry, cannot give any such effect to them; but they stand as if no

such inquiries had been made, and are samples taken at the
199 sole instance of the plaintiff, and the defendant is in no manner bound by them, as it might by action of its own.

34. Where conflicting evidence is given, you should weigh it carefully and try to determine what was the fact. In doing so, you have the right to refuse to credit the testimony of any witness, if you believe that such witness was mistaken or had not the opportunity of determining or knowing the particular fact about which he has testified, or if you believe he has willfully testified falsely. The law gives you the right to determine the facts; it also clothes you with the power to determine the weight of testimony, and also to determine the credibility of all witnesses who have testified before you. You are not bound to take the testimony of any witness as being absolutely true unless you are firmly convinced that it is. When witnesses are otherwise worthy of belief and their testimony is conflicting, then the weight and credit should be given to those whose means of information were superior, and greater weight should be given to the testimony of witnesses who swear affirmatively to a fact, rather than those who swear to it negatively, and who show want of knowledge or recollection. You should endeavor in weighing the testimony given in this case, to harmonize the same, if it is susceptible of harmony.

WM. H. HUNT, *Judge.*

During the argument of respective counsel, the Court directed the attention of counsel of both sides to Rule No. 58 of the Rules
200 obtaining in this court, and particularly to an annotation in the margin of the rules entered in the Judge's copy of the rules, which marginal note reads as follows:

"Exceptions must be taken before the jury retire. Rule 58 is to be so construed.

Mountain Copper Company *vs.* Van Buren, 133 Fed. 2 Wallace, 339."

After delivering the charge, the Court, before the going out of the jury for the considering of their verdict, requested counsel to submit any exceptions they might have to the charge, and to the instructions requested and given or refused.

Thereupon, before the jury retired, counsel for both parties retired to the Judge's room with the charge of the Court, which was in writing, in their possession, and prepared in writing such objections and exceptions to the charge and the several parts thereof, and to the refusals to charge, as they desired, and thereafter in court the defendant presented the following exceptions and none other, which were then and there received by the Court, and signed and allowed before the jury retired.

Such exceptions are as follows, to wit:

[Title of Court, Title of Cause.]

Defendant's Exceptions to Charge.

The defendant, immediately after the Court had charged the jury and before they had left their seats or retired to consider
201 of their verdict, submitted in writing to the Court its objections and exceptions to the said charge, and portions thereof, which objections were then and there severally overruled, and defendant then and there duly excepted. The defendant also submitted in writing herein its objections and exceptions to the charges offered by the defendant and refused, which objections were likewise severally overruled and defendant then and there duly excepted.

Said objections and exceptions are respectively as follows, to wit:

1. To the refusal of the defendant's offered charge No. 1, because it correctly states the law and was not directly covered in the charge of the Court.

2. To the refusal of defendant's offered instruction No. 2, for the reason given in number one.

3. To the refusal of defendant's offered charge No. 3, for the reason as given in No. 1.

4. To the refusal of defendant's offered instruction No. 6, for the same reason as given in No. 1.

5. To the refusal of defendant's offered instruction No. 7, for the same reason as given in No. 1.

6. To the refusal of defendant's offered instruction No. 8, for the same reason as given in No. 1.

7. To the refusal of defendant's offered instruction No. 9, for the reason given in No. 1.

8. To the refusal of defendant's offered instruction No. 10, for the same reason given in No. 1.

9. To the refusal of defendant's offered instruction No. 11, for the same reason given in No. 1.

202 10. To the refusal of defendant's offered instruction No. 12, for the same reason given in No. 1.

11. To the refusal of defendant's offered instruction No. 13, for the reason given in No. 1.

12. To the refusal of defendant's offered instruction No. 14, for the same reason given in No. 1.

13. To the refusal of defendant's offered instruction No. 15, for the same reason given in No. 1.

14. To the refusal of defendant's offered instruction No. 16, for the same reason given in No. 1.

15. To the refusal of defendant's offered instruction No. 18, for the same reason given in No. 1.

16. To the refusal of defendant's offered instruction No. 19, for the same reason given in No. 1.

17. To the refusal of defendant's offered instruction No. 20, for the same reason given in No. 1.

18. To the refusal of defendant's offered instruction No. 21, for the same reason given in No. 1.

19. To the refusal of defendant's offered instruction No. 23, for the same reason given in No. 1.

20. To the refusal of defendant's offered instruction No 24, for the same reason given in No. 1.

21. To the refusal of defendant's offered instruction No. 25, for the same reason as given in No. 1.

22. To the refusal of defendant's offered instruction No. 26, for the same reason as given in No. 1.

23. To the refusal of defendant's offered instruction No. 27, for the same reason as given in No. 1.

24. To the refusal of defendant's offered instruction No. 28, for the same reason given in No. 1.

203 25. To the refusal of defendant's offered instruction No. 30, for the same reason as given in No. 1.

26. To the refusal of defendant's offered instruction No. 31, for the same reason as given in No. 1.

27. To the refusal of defendant's offered instruction No. 32, for the same reason as given in No. 1.

28. To the modification of defendant's offered instruction No. 36, for the reason that the modification incorrectly states the law, and the original instruction as offered does so correctly state it.

29. To the refusal of defendant's offered instruction No. 37, for the same reason given in No. 1.

30. To the refusal of defendant's offered instruction No. 38, for the same reason given in No. 1.

31. To the refusal of defendant's offered instruction No. 39, for the same reason given in No. 1.

32. To the refusal of defendant's offered instruction No. 40, for the same reason given in No. 1.

33. To the refusal of defendant's offered instruction No. 41, for the same reason given in No. 1.

34. To the refusal of defendant's offered instruction No. 42, for the reason that is given in No. 1.

35. To the refusal of defendant's offered instruction No. 44, for the same reason as given in No. 1.

36. To the refusal of defendant's offered instruction No. 46, for the same reason as given in No. 1.

37. To the refusal of defendant's offered instruction No. 47, for the same reason as given in No. 1.

38. To the refusal of defendant's offered instruction No. 49, for the same reason as given in No. 1.

204 39. To the refusal of defendant's offered instruction No. 50, for the same reason as given in No. 1.

40. To the refusal of defendant's offered instruction No. 53, for the same reason as given in No. 1.

41. To so much of charge No. 5 as says, that if plaintiff makes a *prima facie* case of extralateral rights for its discovery vein between the 520 and the 133-foot planes, then the defendant must show to the satisfaction of the jury that plaintiff has no such extralateral

rights, because (1) The burden of proof never shifts as to extralateral rights for discovery veins, and (2) whoever has the burden is only required to establish the fact by fair preponderance of the evidence and (3) that this charge does not correctly state the law.

42. To so much of charge No. 7 as says, that if plaintiff has extralateral rights on the discovery vein between the 520 and the 133-foot planes, it has extralateral rights on that part of the Drumlummon vein because (1) the same is not the law; (2) the Drumlummon, because entering and departing from the side lines of the St. Louis under the Court's charge can have no extralateral rights as a matter of law.

43. To so much of the same charge as says; if the discovery vein pas-es through the earth within the limits of the St. Louis surface boundary between the 520 and 133-foot planes, the plaintiff has extralateral rights, both to it and the Drumlummon vein between those planes, for the reason last given, and also because it gives extralateral rights though the discovery vein does not cut or pass through either end or side line.

205 44. The defendant excepts to so much of the preliminary part of the Court's charge as refuses to consider the estoppel pleaded in defendant's answer, for that it is the duty of the Court to instruct the jury as to the law governing estoppels, and to submit to the jury the determination of such questions of fact as are within the issues.

45. The defendant excepts to charge No. 5, for that it is contrary to law in that the burden of proof throughout is on the plaintiff, and does not shift as therein stated.

46. The defendant excepts to the instruction No. 7 for that the same is misleading and does not correctly state the law governing extralateral rights on by-veins.

47. The defendant excepts to the instruction No. 8, for that it is contrary to the law, in that no presumption whatever arises with reference to the course of the discovery vein.

48. The defendant excepts to the instruction No. 17, for that it is contrary to law, is not sufficiently guarded and is misleading to the jury.

49. Defendant excepts to the 18th instruction, for that it is contrary to law and does not correctly define what mining and milling expenses may be deducted.

50. Defendant excepts to the 19th instruction, given by the Court, for the reason that it does not correctly define the possession plaintiff must have in order to support an action for trespass, and is not applicable to the facts proven and conceded in this case.

51. Defendant excepts to the 20th instruction, for that
206 it is misleading, contrary to the law, and inapplicable to the facts.

52. Defendant excepts to the 21st instruction for that it is contrary to the law, and inapplicable to the facts, and further it instructs the jury to disregard the most valuable and satisfactory evidence in the case upon the question of damages.

53. Defendant excepts to the 22d instruction, for that it is contrary to law and misleading to the jury.

54. The defendant excepts to the 23d instruction, for that it is misleading, inapplicable to the evidence, and contrary to law.

55. The defendant excepts to the 26th instruction given by the Court, for the reason that the statutes of this state do not allow interest on unliquidated demands; that it is contrary to law, and inapplicable to the evidence.

56. The defendant excepts to the 32d instruction given by the Court, for the reason that the same is contrary to law and would require the defendant to surrender its contention that such ore justly belongs to it.

Notice of the foregoing exceptions are given by the defendant and are received and considered by the Court before the going out of the jury on this 6th day of July, 1905.

WILLIAM H. HUNT, *Judge.*

[Endorsed:] Title of Court and Title of Cause. Defendant's Exceptions to charge. Filed July 6th, 1905. Geo. W. Sproule, Clerk.

207 In defendant's proposed bill of exceptions, upon July 31, 1905, the defendant stated its exceptions to the charge given by the Court, in the following language:

"And thereupon and before the going out of the jury the defendant objected in writing to so much of the preliminary portion of the Court's charge as instructed the jury that the affirmative allegations contained in the defendant's answer were not important, and that for that reason no further reference would be made to them. For that the Court should have instructed the jury with reference to the law of estoppel, and that the judgment rendered in the specific performance case and the judgment-roll which the plaintiff itself had introduced in evidence, was an issue in said case, and that the judgment therein rendered was an absolute and conclusive bar to the right of plaintiff to recover for any and all ores mined and extracted from the said compromise ground, without reference to whether the apex of the Drumlummon vein in which said ores were so found was within the St. Louis claim, in whole or in part, and that as to all ores therein contained, they should not take the same into account in estimating plaintiff's damages.

But the Court then and there overruled such objection, to which ruling of the Court, and to the giving of said instruction the defendant then and there duly excepted.

The defendant likewise objected to the fifth instruction as given by the Court, for that the said instruction requires the defendant to show the course or strike and dip of plaintiff's discovery
208 vein, and the burden of proof to show the same was and is upon the plaintiff, and does not change as in said instruction stated.

And for the further reason that the strike and dip of plaintiff's discovery vein is not an issue under the pleadings in this case.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court, the defendant then and there duly excepted.

The defendant likewise objected to instruction number 8 for the reason that no presumption arises that the discovery vein of plaintiff's said discovery vein extended through the entire length of its location. And for the further reason that the burden of proof as to the strike or dip of the discovery vein is upon the plaintiff throughout and does not change to the defendant. And for the further reason that if the strike or dip of the discovery vein of plaintiff's said St. Louis claim was material, it should have been pleaded.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court to the giving of said instruction, the defendant then and there duly excepted.

And defendant objected to the 17th instruction, for the reason that the same was contrary to law and was misleading to the jury, and in effect instructed the jury to award damages to the plaintiff if they should find that it mined any ores within the area claimed by the plaintiff after the service of summons upon it, and the same would indicate a willful trespass on the part of the defendant,
209 and that it left out of consideration entirely the effect upon the defendant's mind of the affirmation by the Supreme Court of the United States, of the judgment in the specific performance case, which was absolutely conclusive of defendant's right to mine said ores within said disputed area.

But the Court overruled each and every of such objections and gave said instruction.

To which ruling of the Court and the giving of said instruction the defendant then and there duly excepted.

And defendant then and there duly objected to the 18th instruction given by the Court to the jury, for that it was contrary to law and did not correctly, or at all, define what mining or milling expenses the jury might reasonably deduct, should they find that the trespass was not a willful one.

But the Court overruled each and every of said objections and gave said instruction.

To which ruling of the Court the defendant then and there duly excepted.

Defendant objected to instruction numbered 19 given by the Court to the jury for the reason that it does not correctly define, or define at all, the possession the plaintiff must have of the premises from which the ore was mined in order to support an action for trespass, in that the evidence showed that all of the ore was mined within the ground covered by defendant's patent for its Nine Hour claim, and that by the Defendant's Exhibit "A," the judg-
210 ment in the specific performance case and the deed made in pursuance thereof, the defendant was entitled to all the ores found within the compromise ground, and the defendant could not have a possession sufficient to support an action of trespass for any ores found beyond, and to the eastward of said compromise ground.

But the Court overruled such objections and gave said instruction.

To which ruling of the Court the defendant then and there duly excepted.

The defendant likewise objected to the 20th instruction given by the Court to the jury for that it was misleading and contrary to law, and inapplicable to the facts. And for the reason that it instructed the jury not to consider the evidence on the part of the defendant with reference to value of the ore mined in the disputed area, but to be governed entirely by the evidence of the plaintiff in that regard.

But the Court overruled such objection and gave the said instruction.

To which ruling of the Court and the giving of said instruction the defendant then and there duly excepted.

And the defendant also objected to the 21st instruction given by the Court to the jury for that it was and is contrary to law and inapplicable to the facts as proven and it instructed the jury to disregard the most valuable and satisfactory evidence in the case with reference to value of the ores extracted in the disputed area.

But the Court overruled such objection and gave said instruction.

211 To which ruling of the Court and to the giving of said instruction, the defendant then and there duly excepted.

The defendant objected to the 23d instruction given by the Court to the jury, for that the same was misleading and inapplicable to the facts and contrary to law.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court the defendant then and there duly excepted.

The defendant objected to the 32d instruction given by the Court to the jury, for the reason that the same was and is contrary to law in that it would require the defendant to surrender its claim to be the owner of the ore in controversy as a condition to prevent the recovery of damages for the extraction in this case, and its surrender and return to the plaintiff in the injunction case, should the injunction case be decided in favor of the plaintiff. And for the further reason that the Court should have instructed the jury that it could not take into account such ores as it was satisfied from the evidence were being held by the defendant under such injunction order.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court the defendant then and there duly excepted.

The Court declined to allow the exceptions as stated in the proposed bill of defendant, and directed that the bill incorporate

212 the exceptions and objections made and allowed before the jury retired, to which ruling of the Court the defendant then and there duly excepted.

Refused Instructions.

And the defendant before the commencement of the argument of the case to the jury, requested the Court to charge the jury in writing as follows, to wit:

"I. The defendant having heretofore and on or about the first day of June, A. D. 1905, recovered a judgment and decree against the above-named plaintiff in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, being the judgment and decree mentioned and set forth in the answer herein, and in evidence before you, and it not appearing from the testimony herein that said judgment, in so far as it awards all of the mineral contained in the compromise ground to the defendant herein has been, or was at any time modified, reversed or so restricted in its meaning as to apply only to such minerals as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said compromise ground, and it appearing further that in and by said judgment and decree the plaintiff herein was forever barred from all interest or claim to said compromise ground or to any part or portion thereof, or to the possession thereof, or of the minerals or any thereof. You are instructed that such judgment and decree absolutely concludes the plaintiff as to any and all minerals contained in said compromise ground,
213 whether the leads, lodes or veins wherein such mineral is found have or have not their apices within the surface boundaries of the plaintiff's St. Louis claim or otherwise, and as for all alleged trespasses in said compromise ground, you will not take the same into your consideration or return any verdict therefor."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give said instruction the defendant then and there excepted.

The defendant also at the time and place aforesaid requested the Court in writing to charge the jury as follows, to wit:

"II. The Court instructs you that in order to entitle a miner to follow a vein or lode having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of the top or apex within his surface boundaries. In this case, the plaintiff alleges that between what it denominates its 108 and 133-foot planes, it has only a part of the top or apex of the Drumlummon lode within its surface boundaries. The Court therefore instructs you that as between these two planes, plaintiff would not have the right to follow this vein on its dip, and you will disregard all testimony relating to ores mined on the dip of the vein between these two planes mentioned and denominated the 108 and the 133-foot planes."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give
214 the said instruction, the defendant then and there duly excepted.

The defendant likewise at the time and place aforesaid requested the Court in writing to charge the jury as follows, to wit:

"XII. It is alleged in the answer in this case that a judgment was duly rendered and given on or about the first day of June, A. D. 1905, in an action then pending in the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis and Clarke, wherein the predecessor in interest of the defendant in this action was plaintiff, and the plaintiff herein was defendant. Whereby, it is claimed, that all of the mineral contained in the thirty-foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of plaintiff by its replication filed in this action, that such judgment was rendered, but it is alleged that it was confined to such mineral, and to such mineral only, as was or is found in leads or lodes having their tops or apices wholly within the surface boundaries of said compromise strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the compromise ground was distinctly in issue in that case, as appears by the pleadings, which are likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of plaintiff's right to recover,
for any and all ores which you may find that the defendant
215 has mined within the surface boundaries of the compromise
ground extended down vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff.

In pleading, that is an issue which is affirmed or alleged on one side and denied on the other. For example, if you find from the complaint in the specific performance case, which has here been introduced in evidence, that it was alleged that the plaintiff therein is the owner of all the mineral contained in the thirty-foot strip or compromise ground, and that the answer of defendant in that case, the plaintiff in this case denies that the plaintiff in the specific performance case was so the owner of such minerals or any thereof, then this was an issue in that case. The judgment in said case being for the plaintiff therein, the predecessor in interest of the defendant in this action, not only for the compromise strip but for all of the mineral therein contained, such judgment is absolutely conclusive upon these parties in this case, and the plaintiff herein is not entitled to recover a verdict at your hands for any ore found within the surface boundary of the compromise ground extended downward vertically. The judgment or decree in the specific performance case upon this question concludes the parties to that litigation, and constitutes a bar to this action so far as the mineral contained in the compromise ground is concerned."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give
216 said instruction the defendant then and there duly excepted.

The defendant likewise, at the time and place aforesaid, requested the Court in writing to charge the jury as follows, to wit:

"XVI. The section of the mineral land act which grants to the owner of a mining claim the right of extralateral pursuit of a vein having its top or apex within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or posssesor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of the claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis claim introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extralateral right on the Drumlummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim of defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extralateral rights, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drumlummon vein and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

But the Court would not and did not give said instruction, and marked the same refused,

217 To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise requested the Court in writing to charge the jury as follows, to wit:

"XIX. The burden of proof in this case is on the plaintiff, and unless you find from the preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, then your verdict should be for the defendant."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court, and to its refusal to give the said instruction, the defendant then and there duly excepted.

Defendant likewise at the time and place aforesaid requested the Court in writing to instruct the jury as follows, to wit:

"XXI. As I have already explained to you, plaintiff's extralateral right on the Drumlummon vein where the same is found within the surface boundaries of the St. Louis claim, is limited and controlled by the extralateral rights which you may find from the testimony it has, or would be entitled to, on its discovery vein, should that vein in its course downward on its dip extend to and under the surface boundary of the Nine Hour claim. The law does not contemplate that the owner of a mining claim should have a greater length of vein beneath the surface than it has length of apex of the vein

218 on the surface. For illustration, suppose that the plaintiff in this case had only one hundred feet of the apex of the St. Louis claim within the surface boundaries of its claim, and that it was so situated, with reference to the Nine Hour claim, that on its dip downward and under the surface of that claim it would have extralateral rights, then it would only be entitled to one hundred

feet in length along the course or strike of the vein in the Nine Hour claim.

"Applying these principles to the case at bar, the Court instructs you that if you should find from a preponderance of the testimony that the vein in the 65-foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental tunnel or fissure, then plaintiff's extralateral rights on the Drumlummon vein are controlled by the length of the discovery vein of the St. Louis claim and are practically coterminous therewith. To illustrate what I mean, suppose that you should find that at the northerly end of the discovery vein of the St. Louis it terminates practically at the end of the northeasterly drift driven by plaintiff from the bottom of its 65-foot shaft, then you would be authorized to draw an imaginary line from said point to the Drumlummon vein, at right angles to the general course or strike of said Drumlummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extralateral rights on the Drumlummon vein.

Then should you further find, from a preponderance of the
219 testimony, that plaintiff's discovery vein on its westerly course practically terminates at the Transcontinental tunnel or fissure, then a line drawn at right angles to the general course of the Drumlummon vein to such westerly point of termination of the St. Louis discovery vein will mark the termination of plaintiff's extralateral rights in said Drumlummon vein, no matter how much further to the southward the whole, or a part of the apex of the Drumlummon vein may be found within the St. Louis claim.

Walrath *vs.* Champeny Mining Co., 171 U. S. 297-308."

But the Court would not and did not give the said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

Defendant, as aforesaid, requested the Court in writing to instruct the jury as follows, to wit:

"XXII. If you should find from the testimony that the vein in the sixty-five-foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental tunnel, and that the vein found in the sixty-five-foot shaft passes through the fissure shown in the Transcontinental tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant unless the plaintiff has satisfied you by a preponderance of the evidence that such vein continues on its course through its St. Louis claim, and passes out of the south end line of its claim, or practically does so. If you should find from the
220 evidence that the fissure shown in the south side of the Transcontinental tunnel at a point a little westerly of the point where the vein from the sixty-five-foot shaft intersects said tunnel is the same fissure as that in which the vein in the sixty-five-foot tunnel is found, but that it only extends into the wall of the tunnel for a few feet, and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental tunnel as prac-

tically the southerly end of plaintiff's said discovery vein, and your verdict should be for the defendant."

But the Court would not and did not give the said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendnant as aforesaid requested the Court in writing to instruct the jury as follows, to wit:

"XXVI. The Court instructs you that your first duty is to examine and ascertain what, if any, extralateral rights attach to the discovery vein of plaintiff's St. Louis claim. In the first place, you must ascertain which of the surface lines, are, in law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them out on the ground, and named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practically parallel to the course of the discovery vein as it passes through the claim. For example, if you should find
221 from the evidence that the discovery vein of the St. Louis claim was in what has been denominated the 65-foot shaft, and that the vein therein discovered, on its course or strike through the claim, would pass out of the surface boundaries of the St. Louis between corners numbered one and two thereof, and that following said course in a southerly direction, it would pass out of the westerly boundary of said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this case would terminate, when you had found that fact. This is so because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which he first discovered, and upon which he made his location, was substantially parallel to the easterly boundary line of his claim, before you would be justified in awarding him extralateral rights on the Drumlummon vein, or on so much of it as has its apex inside the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis ground through the easterly boundary thereof, then, in whatever direction it might dip, it would not have extralateral rights within or under the Nine Hour claim, and extralateral rights could not be claimed for the Drumlummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled to all of the Drumlummon lode found within their surface boundaries, but they could not pursue it on its dip an inch beyond the easterly line of the St. Louis claim, extended
222 downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him extralateral rights under the Nine Hour claim, it is plaintiff's misfortune, and one which neither this Court nor this jury can correct. Mr. Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made. He should have staked his claim along the strike of the vein, and not across it.

Walrath *vs.* Champion Mining Co., 171 U. S. 297-308."

But the Court would not and did not give such instruction and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise at the time and place aforesaid requested the Court to instruct the jury as follows, to wit:

"XXVIII. It conclusively appears by the testimony in this case that it is an undisputed fact that the Compromise ground, or the thirty-foot strip, as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode Mining Claim.

The Court therefore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis claim was first located and first patented, having been patented as a part of the St. Louis, the Compromise ground is to be regarded as
223 standing exactly on the same plane, so far as priority is concerned, with every other part of the St. Louis claim."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise requested the Court in writing to instruct the jury as follows, to wit:

"XXXI. Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterward deeded to the defendant company or its predecessor, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour does not involve any admission on the part of the defendant that the portion of the St. Louis claim outside of the compromise strip is prior in right or time to said strip. In a case where there is equality and not priority of right or location, and the hanging and foot-walls of the vein cross the different points, the width of the vein must be equally divided; and so, in this case, the plane would be drawn at the 120½-foot or half way between the 108-foot and the 133-foot plane, and there could be no recovery by the plaintiff except for ores shown
224 by the evidence to have been extracted north of this 120½-foot plane; and if as to any block or blocks or areas of extraction, the evidence leaves it doubtful as to whether any of it, or if any, how much of it was extracted north of the 120½-foot plane, you must treat that block or those blocks as having been extracted south rather than north of that plane, and there could be no recovery therefor, for the burden is on the plaintiff to show by a fair preponderance of the evidence what it is entitled to recover."

But the Court would not and did not give the said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise requested the Court in writing to instruct the jury as follows, to wit.

"XXXII. Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterwards deeded to the defendant company or its predecessors, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour, does not involve any admission on the part of the defendant that the portion of the St. Louis claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not
225 priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action, did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis company to follow the vein to depth in this action must be limited by what is called the 108-foot plane, or the departure point of the hanging-wall and that there can be no recovery in this case for any ores extracted south of the 108-foot plane."

But the Court would not and did not give the said instruction and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

And the defendant prays that this, its bill of exceptions to the errors aforesaid, may be signed, sealed and made a part of the record, which is done accordingly this 14th day of August, A. D. 1905.

WILLIAM H. HUNT, *Judge.*

Service by copy is hereby acknowledged this 15th day of August, 1905.

M. S. GUNN,
J. B. CLAYBERG,
BACH & WRIGHT, AND
ARTHUR BROWN,
Attorneys for Plaintiff.

[Endorsed:] Title of Court and Cause. Bill of Exceptions. Filed August 15th, 1905. Geo. W. Sproule, Clerk.

226 And thereafter, to wit, on the 21st day of August, A. D. 1905, the defendant filed its assignment of errors herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Assignment of Errors.

Come now, the defendant, the Montana Mining Company, Limited, plaintiff in error, by Messrs. W. E. Cullen, Wm. Wallace, Jr., and W. E. Cullen, Jr., its attorneys, and says that the record and proceedings in the above-entitled case show there is manifest error in this, to wit:

I.

The witness, Wm. Mayger, having testified that the original location of the St. Louis Lode was at the point marked on the map (Plaintiff's Exhibit No. 1) as the 65-foot shaft and that a vein was connected with that original discovery.

Whereupon the witness was asked the following question:

Q. "Which direction does it run?

227 To which said question the defendant objected on the ground that the same was irrelevant and immaterial, and the Court erred in overruling said objection for that the direction or strike of the discovery vein was not in issue, there being no allegation in the complaint relating to the strike or dip of the discovery vein.

II.

The Court erred in permitting the witness William Mayger to testify as to the ground which had been stoped out by the defendant northerly of the 133-foot plane, and to point the same out to the jury on the map (Plaintiff's Exhibit No. 1). The witness having testified that the ground between the planes, from the surface down to the 190-foot level of the Montana company, had been stoped out by the defendant, was asked this question, to wit:

Q. "Point out to the jury westerly of the 133-foot plane where the stopes have been taken out?" To which question the defendant objected.

For the reason that the same was and is irrelevant and immaterial, because the stoping he was so required to testify about, was between plaintiff's 133 and 108-foot planes as shown on this map (Plaintiff's Exhibit No. 1), and between said points the plaintiff did not have the whole of the apex of the said Drumlummon vein within the surface lines of its claim, and it had no right to take the said vein on its strike beyond the west line of the Compromise ground, or to take any portion of the surface of said Com-

228 promise gr-und, and the Court erred in admitting in evidence over defendant's objection testimony as follows:

(*a*) In permitting the witness, William Mayger, to testify, as follows: "The entire vein is stoped out between the 108 and 133-foot planes, from the surface to the 190-foot level of the Montana company's works."

(*b*) In permitting the witness, Parks, to testify as follows: "I have block No. 1, the stope south of the north line of the Montana company's apex shaft, to the 133-foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the Compromise ground extended downward vertically. The block has an average width of 7 feet, is 21 feet long and 36.3 feet high."

Also the testimony of said witness, as shown by the record with reference to blocks 2, 3, 5, 6 and 7, all of which lie wholly within the Compromise ground, and between plaintiff's so-called 108 and 133-foot planes.

III.

The Court erred in admitting evidence, over defendant's objection, of the strike and dip of plaintiff's discovery vein as follows, to wit:

(*a*) In permitting the witness, Wm. Mayger, to testify that the St. Louis Discovery Vein, ran very nearly parallel with the side lines of the St. Louis, as staked; that it dipped to the east; that they had traced it to within 95 feet of the end line at the south end, and within 400 feet of the north end.

(*b*) In permitting the witness, Walter Proctor Jenny, to
229 testify as follows: "I have examined the discovery vein of the St. Louis Lode Mining Claim. Its course is substantially northeast and southwest. Explorations underground show that it lies within 750 feet of the north end line, and in the south end it is traced to within 95 feet of the end line. The dip of the vein is from vertically to a dip of 85° to 90/ easterly."

(*c*) In permitting the witness, John R. Parks, to testify as follows, to wit: "The discovery vein of the St. Louis is a gold-bearing fissure vein, running in the general direction of the side lines. The vein is developed both northerly and southerly from the Transcontinental tunnel."

(*d*) In the admission of all other testimony, shown in the record relative to the discovery vein of plaintiff's St. Louis Mining Claim, all of such testimony having been admitted over defendant's objections.

IV.

The Court erred in admitting all testimony as shown by the record, relating to ores mined by the defendant in the compromise ground, for the reason that the plaintiff was estopped by the judgment in the Specific Performance case from claiming any ore or mineral found within the surface boundaries of said compromise ground, and, particularly the Court erred in permitting the witness, William Mayger, to testify, over defendant's objection, that "The entire vein is stoped out between the 108 and 133-foot planes, from the surface to the 190-foot level of the Montana Company's

works. I had Professor Parks and Mr. Keerl measure up
230 the stopes taken out by the defendant, and compute the number of tons that had been so taken."

(*b*) In admitting the testimony of Joseph Wallish over defendant's objection as follows: "I have heard the testimony of Mr. Parks, and heard him speak of testing certain samples. I was present when those samples were taken. The first sample was taken in the Montana company's apex shaft; it was taken from the northeasterly portion of the shaft."

(*c*) In admitting the testimony of John R. Parks, over defendant's objection, and permitting him to testify as follows: "I have block No. 1, the stope south of the north line of the Montana company's apex shaft, to the 133-foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the compromise ground extended downward vertically."

V.

The witness, William Mayger, having testified that the plaintiff had workmen on the south end of its St. Louis Claim, on Saturday, the 29th day of May, 1905, developing the foot-wall of the vein, was asked on cross-examination this question, to wit:

"If that man were at work 78 feet below corner No. 3, and there had been no foot-wall there, will you tell me the width of that apex provided the hanging-wall took the course you indicated by your ruler from the 108-foot plane crossing through the Nine Hour shaft?"

Which question was objected to by the plaintiff, and the Court erred in sustaining such objection, for the reason that the
231 same was proper cross-examination as tending to develop the knowledge of the witness and his interest in the litigation.

VI.

The Court erred in admitting in evidence a certain map of the St. Louis Mining Claim, and in permitting blue print copies of the same to be given to each of the jurors. The only authentication of said map being that the witness William Mayger on his redirect, upon being shown the map by counsel, testified that generally speaking it represented as far he knew anything about it, the general situation, but that he did not know who prepared the map or the map of which it was a copy. That it was a fair enough illustration except that according to his idea, there was not so much throw of the discovery vein on the fault line, and that the two ends ought to be nearer together and that a line ought to be a little bit higher up, otherwise it was all right.

VII.

The Court erred in permitting the witness William Mayger to answer the following question relating to said map, to wit:

Q. "I will ask you if that bears a general resemblance of the

general situation of the Drumlummon Mining Claim to the rest of the property?"

For that the question was leading, immaterial and irrelevant.

VIII.

The Court erred in admission of evidence offered by the plaintiff in the following instances, to wit:

232 (1.) The witness John R. Parks, having testified that himself and Mr. Keerl made a careful survey of the ground and accurately measured all of the stopes and cavities from which ore had been removed, was permitted to testify over defendant's objection as to ore removed between the 108 and the 133-foot planes and ore lying wholly within the surface boundaries of the Compromise Ground.

(2.) The said witness having testified that he had divided the stoped ground into eleven blocks lying north of the 133-foot plane down to the 190-foot level in the defendant's ground, was required to take the blocks and tell the tonnage and value he found in each block over the objection of the defendant. For that it included blocks in the Compromise ground, which by the judgment and decree in the Specific Performance case, was found to be the property of the defendant, and because they were not within the recovery period under the pleadings in the action, in that a portion thereof at least was taken out since September 16th, 1893, and also because the recovery for ore extracted after September 16th, 1893, is limited by the supplemental pleading.

(3.) The Court erred in permitting the witness Parks to testify to what he denominated Block one being the ground south of the north line of the Montana company's apex shaft to the 133-foot plane from the surface to the instrument at K. and containing 410½ tons of the value of $59,522.50.

233 (4.) The Court erred in admitting the said witness Parks to testify with reference to the cubical contents and value of each of the blocks, numbered 2, 3, 4, 5, 6, 7, 8, 9 and 10, for the reason already assigned.

IX.

The Court erred in not permitting the witness for the defendant, John H. Farmer, to answer the following question, to wit:

Q. "Drawing a line at right angles to that one (indicating the east line of the Compromise ground) 50 feet from the center of the discovery shaft on the Nine Hour, where would it bring it on the map, that is from the center of the discovery shaft on the Nine Hour and at right angles to the line between corners 2 and 3 on the St. Louis?"

Said witness having testified that he was a mining engineer and had made the map (Defendant's Exhibit "E") about which he was testifying.

X.

The Court erred in refusing to permit the witness- John Langan, William Robinson, Warren De Camp, F. P. Sterling, John W. Eddy and Joseph K. Toole to be called to the stand, and in requiring the defendant to submit to the court in an offer of proof what it expected to establish by the testimony of each of said witnesses severally.

XI.

The Court erred in refusing to permit the defendant to call to the witness-stand, John H. Farmer and to prove by him that he had read the complaint in the Adverse Claim suit, brought by
234 the owners of the Nine Hour against the St. Louis claim, which complaint is referred to in the complaint in the Specific Performance case; that he knew the description therein contained and that it represented the area of 1.98 acres. That he had platted the area in conflict on the map (Defendant's Exhibit "E") and that it included the 30-foot strip or the Compromise ground.

XII.

The Court erred in sustaining the objection made by plaintiff and in refusing to permit the defendant to prove by the witness William Robinson, present in court, that he was the person who located the Nine Hour Claim and the representative of his co-owner when the settlement of the Adverse Suit was made. That the whole area in conflict in that suit was 1.98 acres, the boundaries of which were accurately shown upon the map (Defendant's Exhibit "E"); and that all of the strip described in the bond was the easterly 30 feet of said 1.98 acres. That the instructions he received with reference to the settlement of said Adverse Claim suit from his co-owner De Camp, was that he was to retain the right to the ore beneath the Compromise ground without regard to where the apex of the lode was, in which said ore might be contained. That it was arranged with William Mayger representing Charles Mayger, that the Nine Hour claimants were to have the 30-foot strip and, "All of the mineral therein contained" without regard to where the apex of the lode might be in which such mineral was contained. That this was the distinct understanding of the parties before the bond (De-
235 fendant's Exhibit "A") attached to its answer was drawn up. That said bond was drawn up by Messrs. Toole & Toole, who were the attorneys for William Mayger. That the witness, after said bond was drawn up, went to Joseph K. Toole with said bond and inquired of him whether the obligor in said bond could pay the penal sum named therein and avoid making conveyance of the said premises, and whether by its terms the bond gave to witness and his co-owner all of the mineral contained in said Compromise ground regardless of where the lead in which it was found might have its apex. That he knew where the east side line of the St. Louis Lode Mining Claim was prior to the time that he staked his Nine Hour Claim, and that the westerly line of the Nine Hour Claim was not within 25 feet on the south end and 50 feet on the north end of said

St. Louis east side line. That after his discovery, the southeast corner stake of the St. Louis was moved up to a point near the east side line of his Nine Hour Claim, which point is correctly shown on defendant's map (Exhibit "E"). That when the St. Louis was surveyed for patent, such survey was started from its northeast corner stake and ran in the direction of the stake which had been moved to the point marked corner No. 2 on its survey, where a monument was put up, where no stake or monument had ever stood before, from which point the said side line had an angle to its corner No. 3. That the extension of said east side line of said St. Louis Claim over witness' Nine Hour Claim was wrongful and resulted in securing as a part of said St. Louis Mining Claim all of the area of said
236 Nine Hour Claim embraced within said line, save and except the 30-foot strip.

XIII.

The Court erred in refusing to permit the defendant to call Warren De Camp and to establish by him that he was a co-owner in the Nine Hour Claim at the time that the Adverse Claim suit was pending; that he knew the settlement that was made and that he would not have consented thereto, but for the fact that the owners of the Nine Hour were to have the 30-foot strip, together with all of its mineral contents regardless of where the apex of the lode in which such mineral so found, might be. That he knew of the wrongful extension of the east side line of the St. Louis over the Nine Hour, made at the time of the survey for patent of said claim. That he knew where the east line of the St. Louis was as originally staked, and the west line of the Nine Hour as that claim was staked, and that there was an interval of unclaimed territory between the two lines.

XIV.

The Court also erred in sustaining plaintiff's objection to calling Frank P. Sterling, then in court, to the witness-stand and in refusing to permit the said defendant to prove by said Sterling that at the time (Defendant's Exhibit "A") attached to defendant's answer herein was drawn, he was a lawyer, was interested in said Nine Hour Claim as a co-owner, that he understood the law of apex rights, that it was distinctly understood and agreed between
237 the owners of the Nine Hour and of the owner of the St. Louis at the time said bond was made, that the owners of the Nine Hour should own all of the mineral contained in said 30-foot strip or Compromise ground, and that the owner or owners of the St. Louis, should not have the right to follow into such ground any lead, lode, ledge or vein having its apex within the surface boundaries of the St. Louis Claim. That the witness, William Robinson, after said bond had been drawn up, took it to Governor Joseph K. Toole to learn whether it relieved the ground known as the Compromise ground from the apex rights of the St. Louis Claim adjoining it. And that he, said Robinson, would not accept said bond until he had been so assured of said fact.

XV.

The Court erred in sustaining the objection made by the plaintiff to defendant's offer to prove by the witness John W. Eddy, that he was a co-owner in the Nine Hour Claim at the time of the settlement of the Adverse suit. That it was the distinct understanding between all of the parties to that settlement, that the Compromise ground was to be a piece of ground whose westerly line should be parallel to the lines of the St. Louis between corners numbered 2 and 3 and 50 feet distant from the center of the Nine Hour Discovery shaft. That no settlement or agreement would have been entered into by the obligees named in the said bond; but for the fact that the said obligees were to have all of the mineral contained in said ground without regard to where the apex of the vein might be in which such minerals were found.

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XVI.

The Court also erred in sustaining the objection made by the plaintiff to the calling of John Langan, then in court, to the witness-stand, and in sustaining its objection made to the offer of defendant to prove by said witness that he knew where the east line of the St. Louis Claim was originally located, and where the west line of the Nine Hour was located, and that he knew that there was a vacant space of unclaimed ground between the two lines. That he knew that the easterly line of the St. Louis was wrongfully extended over the Nine Hour.

XVII.

The Court erred in refusing upon objection of plaintiff to permit the defendant to call Joseph K. Toole and in rejecting its offer to prove by said witness that the bond for a deed (Defendant's Exhibit "A") attached to its answer, was in his handwriting; that the words, "Together with all the mineral therein contained," were inserted therein because that was the agreement of the parties at the time that said bond was drawn.

XVIII.

The Court erred in refusing to receive the original bond (Defendant's Exhibit "A") attached to its answer, in evidence, the defendant offering to show that said bond was in the handwriting of Governor Joseph K. Toole, who witnessed the instrument.

XIX.

The Court erred in refusing to permit defendant to read in
239 evidence the original complaint, and the replication in case No. 2798, Old Series of the records of the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis & Clarke, wherein William Robinson, *et al.*, were plaintiffs and Charles F. Mayger was defendant, being the Adverse Claim Suit referred to in the record in the Specific Perform-

ance Case, for the purpose of showing that the area involved was the 1.98 acres testified to as shown upon (Defendant's Exhibit "E").

XX.

The Court erred in granting the plaintiff permission to amend the *ad damnum* clause of its complaint so as to change the $50,000 therein mentioned to $400,000. Such amendment not being necessary in order to make the pleadings correspond with the proof, and the same depriving the defendant of substantial rights.

XXI.

The Court erred in overruling and denying defendant's motion to direct a verdict in its favor.

XXII.

The Court erred in its charge to the jury in telling them in the preliminary portion of its charge that, "defendant's answer then contains affirmative allegations which are not important in this trial and therefore no further reference is made thereto."

XXIII.

The Court erred in its charge in giving to the jury its
240 instruction numbered 5, which said instruction is as follows, to wit:

"The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and the 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

XXIV.

The Court erred in charging the jury as in its instruction No. 8, which said instruction is as follows, to wit:

"If you find that the course of strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or elsewhere is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location. And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extralateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis Claim, between the 520 and the 133-foot planes, that the discovery vein of the St. Louis Claim

should pass through either end line of said claim, but it is
241 sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis Claim between said planes generally lengthwise of the claim."

XXV.

The Court erred in its charge to the jury in giving its instruction No. 17, which is as follows, to wit:

"If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use quartz, rock and ore, within the planes belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injury it has sustained."

XXVI.

The court erred in its charge to the jury in giving to the jury its instruction No. 18, which said instruction is as follows, to wit:

"The defendant, even if an innocent trespasser, is not en-
242 titled to claim any mitigation of damages for the moneys expended in the running of levels, sinking of shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant, or any salaries paid to its officers, or any wages to any person, except those actually employed and engaged in the extraction, transportation and milling of the ores in question."

XXVII.

The Court erred in its charge to the jury in giving its instruction No. 19, which is as follows, to wit:

"When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such a vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it was a

trespass upon said claim within its surface boundaries. And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest
243 intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis Claim and the ore extracted therefrom."

XXVIII.

The Court erred in its charge to the jury in giving to said jury its 20th instruction, which is as follows, to wit:

"If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and the 133-foot planes, and the value thereof, and that it did not do so, but took away from the plaintiff the means of proving the true and correct amount and value thereof, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by the misconduct of defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find from the facts as above indicated, you are at liberty to follow the evidence given in behalf of the plaintiff, as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence."

XXIX.

The Court erred in its charge to the jury in giving to said jury its 21st instruction, which is as follows, to wit:

"As to the evidence disclosed by the books of defendant and the abstract thereof, offered in evidence in behalf of defendant, I charge you that to entitle them to be considered as sufficient evidence
244 to prove the value of the ore extracted from the Drumlummon vein, you must be satisfied that the ore taken from other parts of the defendant's mine, which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition."

XXX.

The Court erred in giving to the jury its 23d instruction, which is as follows, to wit:

"The law is well settled that if one willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value of which the property in question can be reasonably estimated."

XXXI.

The Court erred in its charge to the jury by giving to the jury its instruction No. 32, which is as follows, to wit:

"In considering any ore extracted from Block 8, part of which was removed under the authority of this Court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were
245 offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed you should make a deduction in accordance with the general rules laid down in the charge."

XXXII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. 1.

"The defendant having heretofore and on or about the 1st day of June, A. D. 1895, recovered a judgment and decree against the above-named plaintiff in the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke, being the judgment and decree mentioned and set forth in the answer herein and in the evidence before you. And it not appearing from the testimony herein, that said judgment, in so far as it awards all of the mineral contained in the Compromise ground to the defendant herein, has been, or was at any time modified, reversed or so restricted in its meaning, as to apply only to such mineral as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said Compromise ground, and, it appearing further, that in and by said judgment and decree, the plaintiff herein was forever barred from all interest or claim to said Compromise ground, or to any part or portion thereof or to the possession thereof, or, of the mineral or any thereof. You are instructed that such judgment and
246 decree absolutely concludes the plaintiff as to any and all mineral contained in said Compromise ground, whether the leads, lodes or veins wherein such mineral is found, have, or have not their apices within the surface boundaries of the plaintiff's St. Louis Claim or otherwise, and as for all alleged trespasses in said Compromise ground, you will not take the same into your consideration or return any verdict therefor.

The Court instructs you that in order to entitle a miner to follow a vein or lode, having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of such top or apex within his surface boundaries. In this case, the plaintiff alleges that between what it denominates its 108 and 133-foot planes, it has only a part of the top or apex of the Drumlummon Lode within its surface boundaries. The Court therefore instructs you that as between these two planes, the plaintiff would not have the right

to follow this vein on its dip, and you will disregard all testimony relating to ores mined on the dip of the vein between these two planes mentioned and denominated the 108 and the 133-foot planes."

XXXIII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. II, which said instruction is as follows, to wit:

"It appearing that in and by the bond for a deed, a copy whereof is annexed to the defendant's answer herein, and by the judgment rendered on or about June 1st, 1895, in the District Court of the First Judicial District of the State of Montana, in and for the
247 county of Lewis & Clarke, in an action wherein the predecessor in interest of the defendant herein was plaintiff and the plaintiff herein was defendant, the plaintiff herein was precluded from asserting any right, title, or interest in and to the Compromise ground, or to any and all mineral therein contained, the said plaintiff had neither the actual nor constructive possession of the ground in which the trespasses complained of are alleged to have been committed and is, therefore not entitled to recover in this action. You are therefore instructed to return a verdict for the defendant."

XXXIV.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XII, which said instruction is as follows, to wit:

"It is alleged in the answer in this case that a judgment was duly rendered and given on or about the 1st day of June, A. D. 1895, in an action then pending in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis & Clarke, wherein the predecessor in interest of the defendant in this action was plaintiff and the plaintiff herein was defendant. Whereby, it is claimed, that all of the mineral contained in the thirty-foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of the plaintiff by its replication filed in this action, that such judgment was rendered, but, it is alleged that it was confined to such mineral, and such mineral only, as was or is found in leads or lodes having their tops or apices wholly within the
248 surface boundaries of the said Compromise strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the Compromise ground was distinctly in issue in that case, as appears by the pleadings, which are likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of the plaintiff's right to recover, for any and all ores which you may find that the defendant has mined within the surface boundaries of the Compromise ground extended downward vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff."

XXXV.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XVI, which said instruction is as follows, to wit:

"The section of the Mineral Land Act which grants to the owner of a mining claim the right of extralateral pursuit of a vein having its top or apex within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course, beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis Claim, introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extralateral right on the
249 Drumlummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim of the defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extralateral right, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drumlummon vein, and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

XXXVI.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XIX, which said instruction is as follows, to wit:

"The burden of proof in this case is on the plaintiff, and unless you find from a preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, than your verdict should be for the defendant."

XXXVII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXI, which said instruction is as follows, to wit:

"As I have already explained to you, plaintiff's extralateral rights on the Drumlummon vein, where the same is found within surface boundaries of its St. Louis Claim, is limited and controlled by the extralateral rights which you may find from the testimony it has, or would be entitled to on its discovery vein, should that
250 vein in its course downward on its dip extend to and under the surface boundaries of the Nine Hour Claim. The law does not contemplate that the owner of a mining claim shall have a greater length of vein beneath the surface than he has length of apex of the vein on the surface. For illustration, suppose that the plaintiff in this case, had only one hundred feet of the apex of its St. Louis Claim within the surface boundaries of its claim, and that it was so

situated, with reference to the Nine Hour Claim, that on its dip downward and under the surface of that claim it would have extralateral rights; then it would only be entitled to one hundred feet in length along the course or strike of the vein in the Nine Hour Claim.

Applying these principles to the case at bar, the Court instructs you that if you should find from a preponderance of the testimony that the vein in the sixty-five-foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis Claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental tunnel or fissure, then plaintiff's extralateral rights on the Drumlummon vein are controlled by the length of the discovery vein of the St. Louis Claim and are practically coterminous therewith. To illustrate what I mean, suppose you should find that at the northerly end of the discovery vein of the St. Louis, it terminates practically at the end of the northeasterly drift driven by plaintiff from the bottom of its sixty-five-foot shaft, then you would be authorized to draw an imaginary line from said point to the Drumlummon vein, at right angles to the general course or strike
251 of said Drumlummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extralateral rights on the Drumlummon vein. Then should you further find, from a preponderance of the testimony, that plaintiff's discovery vein on its westerly course practically terminates at the Transcontinental tunnel or fissure, then a line drawn at right angles to the general course of the Drumlummon vein to such westerly point of termination of the St. Louis discovery vein, will mark the termination of plaintiff's extralateral rights in said Drumlummon vein, no matter how much further to the southward the whole, or a part of the apex of the Drumlummon vein may be found within the St. Louis Claim."

XXXVIII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXIII, which said instruction is as follows, to wit:

"If you should find from the testimony that the vein in the sixty-five-foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental tunnel, and that the vein found in the sixty-five-foot shaft passes through the fissure shown in the Transcontinental tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence, that such vein continues on its course through its St. Louis Claim, and passes out of the south end
252 line of its claim, or practically does so. If you should find from the evidence that the fissure shown in the south side of the Transcontinental tunnel at a point a little westerly of the point where the vein from the sixty-five-foot shaft intersects said tunnel is the same fissure as that in which the vein in the sixty-five-foot drift is found, but that it only extends into the wall of the tunnel for a few

feet and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental tunnel as practically the southerly end of plaintiff's said discovery vein, and your verdict should be for the defendant."

XXXIX.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXVI, which said instruction is as follows, to wit:

"The Court instructs you that your first duty is to examine and ascertain what, if any extralateral rights attach to the discovery vein of plaintiff's St. Louis Claim. In the first place you must ascertain which of the surface lines, are, in law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them out on the ground, or named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practically parallel to the course of the discovery vein as it passes through the claim. For example, if you should find from the evidence that the discovery vein of the St. Louis Claim was in what has been denominated the 65-foot shaft, and that the vein therein dis-
253 covered, on its course or strike through the claim, would pass out of the surface boundaries of the St. Louis, between corners numbered one and two thereof, and that following said course in a southwesterly direction, it would pass out of the westerly boundary of the said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this cause would terminate, when you had found that fact. This is so, because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which he first discovered, and upon which he made his location, was substantially parallel to the easterly boundary line of his claim, before you would be justified in awarding him extralateral rights of the Drumlummon vein, or on so much of it as has its apex inside the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis ground through the easterly boundary thereof, then, in whatever direction it might dip, it would not have extralateral rights within or under the Nine Hour Claim, and extralateral rights could not be claimed for the Drumlummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled to all of the Drumlummon lode found within their surface boundaries, but they could not pursue on its dip an inch beyond the easterly line of the St. Louis claim, extended downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him
254 extralateral rights under the Nine Hour Claim, it is plaintiff's misfortune, and one which neither this Court nor this jury can correct. Mr. Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made.

He should have staked his claim along the strike of the vein, and not across it."

XL.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXVIII, which said instruction is as follows, to wit:

"It conclusively appears by the testimony in this case, and it is an undisputed fact that the Compromise ground or the 30-foot strip, as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode Mining Claim. The Court therefore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis Claim was first located and first patented. Having been patented as a part of the St. Louis, the Compromise ground is to be regarded as standing exactly on the same plane, so far as priority is concerned, with every other part of the St. Louis Claim."

XLI.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXXII, which said instruction is as follows, to wit:

"Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterward deeded
255 to the defendant company or its predecessor, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis Claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour, does not involve any admission on the part of the defendant that the portion of the St. Louis Claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action, did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis company to follow the vein to depth in this action must be limited by what is called the 108-foot plane, or the departure point of the hanging-wall and that there can be no recovery in this case for any ores extracted south of the 108-foot plane."

XLII.

The Court erred in giving to the jury its instruction No. 7, which said instruction is as follows, to wit:

"It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis quartz lode mining claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence; but

the defendant insists that the St. Louis quartz lode mining
256 claim is not entitled to extralateral rights on the Drumlummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary or incidental vein of the St. Louis Claim. Under the Statutes of the United States, the locators of a mining claim have the exclusive right of possession and enjoyment of all the surface included within the lines of their location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes of ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. These extralateral rights, under the decisions of the Supreme Court of the United States, as to the secondary or incidental veins, are the same as those given by the statute upon original or discovery veins; and if, therefore, plaintiff had extralateral rights upon its discovery vein, including that portion of the St. Louis Claim within the above planes in which is found the apex of the Drumlummon vein, so called, then plaintiff has extralateral rights upon that part of the Drumlummon vein. Plaintiff claims that the original or discovery vein of the St. Louis Claim runs through the earth beneath the surface of said claim in the general course of the side lines of said claims. If you find from the evidence that the original or discovery vein of the St. Louis Claim, on its course or strike,
pases through the earth within the limits of its surface boun-
257 daries, between the 520 and the 133-foot planes, on a general course lengthwise of the claim, then plaintiff has extralateral rights to such parts of the original discovery vein between said planes, and would have corresponding extralateral rights upon any secondary or incidental veins having their apexes in the St. Louis Claim betwen said planes.

XLIII.

The Court erred in giving to the jury its instruction No. 9, which said instruction is as follows, to wit:

"And if you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) run lengthwise of the St. Louis Claim between its side lines and extend from the 520 to the 133-foot planes, and dip easterly, then plaintiff would be entitled to extralateral rights for that vein (or those veins) and to the like extralateral rights for all other veins having their apices within the same limits, and running in the same general direction."

XLIV.

The Court erred in giving to the jury its instruction No. 11, which said instruction is as follows, to wit:

"There are two rules established and adopted by the Federal and other courts of the United States with reference to the measure of damages in cases of this kind, and which rule applies, depends upon

whether or not the trespass under which the ore was extracted, was willfully committed or done in good faith. If you find from the evidence that the defendant entered on that part of the said Drum-
lummon vein which apexes in the St. Louis quartz lode
258 mining claim, between the planes aforesaid, and extracted the said ore therefrom willfully, recklessly and with knowledge that said vein did apex within the said St. Louis Claim, then your verdict must be for the value of the ore which you must determine from the evidence introduced. If, however, the defendant had sufficient reason to believe, and did honestly believe at the time it entered upon said vein and extracted and removed said ore, that the same belonged to said defendant and not to the plaintiff, and that it had lawful right and authority to extract and remove the same, then the trespass was not willful and the plaintiff is entitled to the value of the ore, subject to the deduction for the reasonable cost of mining of said ore, hoisting the same to the surface, transporting the same to reduction works and the reasonable cost of such reduction. The actual cost to the defendant of all, or any of those items is not conclusive upon the value thereof. Defendant is not entitled to reduce the value of the ore by any sum greater than the reasonable value of the items above mentioned, and you must determine such reasonable value from the evidence given in the case. In determining the character of the trespass, you have the right to disregard all testimony given by the defendant tending to establish good faith, if, in your judgment, the action of the defendant discloses to your satisfaction that the claim of defendant, that it acted under an honest belief that it owned the ore in question and had a right to remove it, was merely for the purpose of reducing the damages which it would
have to pay for such ore upon a suit to recover the value
259 thereof by this plaintiff, and find that the action of defendant in extracting and removing the ore in question was willful."

XLV.

The Court erred in giving to the jury its instruction No. 14, which said instruction is as follows, to wit:

"The burden of proof is upon the plaintiff to show by a preponderance of evidence, its ownership, the amount of ore extracted and its value; and in arriving at a verdict, you are to take into consideration all of the circumstances and facts presented by the evidence in the case. However, if you are satisfied that the plaintiff has shown its ownership, and given evidence tending to show the amount of ore extracted and the value thereof, the burden is upon the defendant to show if it can, that the trespass complained of was not willful. A presumption arises from the extraction of the ore from a vein which has its apex within the plaintiff's mining claim, by the defendant, that the trespass was willful and that the defendant is liable for the value of the ore taken from the mine. This presumption is, however, disputable, and the burden is upon the defendant to show in mitigation of damages that it was not a willful trespasser and thus be relieved from payment of the value of the ore as stated in other instructions herewith given to you."

XLVI.

The Court erred in giving to the jury its instruction No. 15, which said instruction is as follows, to wit:

260 "If you find that the defendant has prevented the plaintiff from ascertaining the exact amount of the ore or its value, by extracting and removing the same, or has placed it beyond the power of the plaintiff to make such proof certain and specific, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by his conduct by making every reasonable intendment against him in favor of the party injured."

XLVII.

The Court erred in giving to the jury its instruction No. 16, which said instruction is as follows, to wit:

"In estimating the damages to the plaintiff, if you find from the evidence that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by extracting the greater part of the ore, or all of the valuable ore in any particular places of the mine, or by mixing the ore taken from plaintiff's ground with ore of less value, belonging to defendant, or with any other material taken from any other places in the mine, then the jury, in determining the value of the ore taken, are at liberty to consider the highest value of ore found in the vicinity of the ore extracted."

XLVIII.

The Court erred in requiring the defendant to submit its exceptions to the charge of the Court, in writing, before the going out of the jury, and in the presence of the jury, the same being contrary to Rule No. 58 which is as follows, to wit:

Exceptions to a charge to a jury, or to a refusal to give as
261 a part of such charge instructions requested in writing, may be taken by any party by stating to the Court after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same.

XLIX.

The Court erred in inserting into the defendant's bill of exceptions on the settlement thereof, the exceptions in writing "hastily made and filed" before the going out of the jury, the same not having been proposed as an amendment by the plaintiff to defendant's proposed bill of exceptions.

L.

The Court erred in refusing to allow the exceptions to the charge of the Court given to the jury, as in defendant's proposed bill of

exceptions and in confining the exceptions of the defendant to the exact language used by it in the written exceptions filed before the retirement of the jury.

Wherefore, the said Montana Mining Company, Limited, plaintiff in error, prays that the judgment of the Circuit Court of the United States, for the District of Montana, be reversed and that the said Circuit Court be directed to enter an order setting aside
262 the verdict and judgment herein and dismissing the said cause of action.

W. E. CULLEN,
WM. WALLACE, JR., AND
W. E. CULLEN, JR.,
Attorneys for Plaintiff in Error.

[Endorsed:] No. 291. Title of Court and Cause. Assignment of Errors. Filed and entered August 21, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 21st day of August, A. D. 1905, the defendant herein, filed its petition for a Writ of Error and Order Allowing Same, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Petition for Writ of Error.

The Montana Mining Company, Limited, the defendant in the above-entitled cause, feeling itself aggrieved by the verdict
263 of the jury and the judgment entered in the above-entitled action on the 7th day of July, A. D. 1905, comes now by W. E. Cullen, Wm. Wallace, Jr., and W. E. Cullen, Jr., its attorneys, and petitions the court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which it shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

WM. WALLACE, JR.,
W. E. CULLEN,
W. E. CULLEN, JR.,
Attorneys for Defendant.

Aug. 21, 1905.

264 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Order Allowing Writ of Error.

Upon the motion of Messrs. W. E. Cullen, Wm. Wallace, Jr., and W. E. Cullen, Jr., attorneys for the defendant, and upon the filing — a petition for writ of error and assignment of errors:

It is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at $212,000, and that said bond, when so given and approved by the Court shall operate as a supersedeas.

WM. H. HUNT, *Judge.*

Aug. 21st, 1905.

[Endorsed:] No. 291. (Title of Court and Cause.) Petition of Defendant for Writ of Error and Order Allowing the Same. Filed and entered August 21, 1905. Geo. W. Sproule, Clerk.

265 And thereafter, to wit, on the 24th day of August, A. D. 1905, defendant filed its bond on writ of error herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, the Montana Mining Company, Limited, a corporation duly organized under the laws of Great Britain, and doing and entitled to do business in the State of Montana, as principal, and the Union Bank and Trust Company, a corporation organized under the laws of the State of Montana and qualified to be a surety on judicial bonds, are held and firmly bound unto the plaintiff, the St. Louis Mining and Milling Company of Montana, a corporation duly organized under the laws of the State of Montana in the full and just sum of two hundred and twelve thousand ($212,000) dollars to be paid to the said St. Louis Mining

and Milling Company of Montana, its certain attorneys or
266 assigns, to which payment well and truly to be made we bind ourselves, our successors and our assigns and each of them jointly and severally and firmly by these presents.

Sealed with our seals and dated this 22d day of August, A. D. 1905.

Whereas, lately at a Circuit Court of the United States for the Ninth Circuit, District of Montana, in a suit pending in said court between the said St. Louis Mining and Milling Company of Montana, plaintiff, and the said Montana Mining Company, Limited, as defendant, a judgment was rendered against the said Montana Mining Company, Limited, and the said Montana Mining Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said St. Louis Mining and Milling Company of Montana, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, in said Circuit, on the 23d day of September next.

Now, the condition of the above obligation is such that if the said Montana Mining Company, Limited, shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make the said plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

And the above-named surety, the Union Bank and Trust Company, does hereby covenant and agree to and with the said
267 St. Louis Mining and Milling Company of Montana, that in case of a breach of any condition in the foregoing bond, this court may, upon notice to it of not less than ten days, proceed summarily in the action or suit in which the same is given, to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it and award execution thereon.

MONTANA MINING COMPANY, LIMITED,
By ALEX. BURRELL, *General Manager.*
UNION BANK AND TRUST COMPANY,
By GEO. L. RAMSEY, *President.*

Attest:
[SEAL.] C. F. MORRIS, *Secretary.*

Sealed and delivered in the presence of:
S. McKENNAN.
P. O. WELLS.

Approved by:

WILLIAM H. HUNT,
United States District Judge.

[Endorsed:] No. 291. (Title of Court and Cause.) Bond. Filed and entered August 24, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

268 *Writ of Error.*

THE UNITED STATES OF AMERICA, *Ninth Judicial Circuit, ss:*

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Ninth Circuit, District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, or some of you, between the St. Louis Mining and Milling Company of Montana, plaintiff, and the Montana Mining Company, Limited, defendant, a manifest error hath happened to the great damage of the said Montana Mining Company, Limited, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, in said Circuit Court, on the 23d day of September next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error,
269 what of right and according to the laws and customs of the United States should be done.

WILLIAM H. HUNT,
United States District Judge.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of August, A. D. 1905, the one hundred and thirtieth year of the Independence of the United States of America.

Attest:
[SEAL.]

GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW,
Deputy Clerk.

Service of the above writ of error accepted this 24th day of August, A. D. 1905.

BACH & WIGHT,
M. S. GUNN, AND
J. B. CLAYBERG,
Attorneys for Plaintiff.

Return to Writ of Error.

The Answer of the Judges of the Circuit Court of the United States for the District of Montana.

The record and all proceedings of the plaintiff in error, wherein mention is within made, with all things touching the same, I hereby certify, under the seal of said court, to the United States Circuit Court of Appeals for the Ninth Circuit within men-
270 tioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

[SEAL.] GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW,
Deputy Clerk.

[Endorsed:] No. 291. In the Circuit Court of the United States, Ninth Circuit, District of Montana. St. Louis Mining and Milling Co. of Montana, Plaintiff, *vs.* Montana Mining Co., Limited, Defendant. Writ of Error. Filed and entered Aug. 24, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

Citation.

The United States Circuit Court of Appeals, for the Ninth Circuit.

THE UNITED STATES OF AMERICA, *Ninth Judicial Circuit, ss:*

To the St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, in said Circuit, on the 23d day of September next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Ninth Circuit, District
271 of Montana, wherein the Montana Mining Company, Limited, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of August, A. D. 1905, the one hundred and twenty-ninth year of the Independence of the United States of America.

WILLIAM H. HUNT,
United States District Judge.

We hereby this 24th day of August, A. D. 1905, accept due personal service of this citation on behalf of the St. Louis Mining and Milling Company of Montana, the defendant in error.

BACH & WIGHT,
M. S. GUNN, AND
J. B. CLAYBERG,
Attorneys for Defendant in Error.

[Endorsed:] No. 291. In the Circuit Court of the United States for the Ninth Circuit, District of Montana. St. Louis Mining and Milling Company of Montana, Plaintiff, *vs.* Montana Mining Company, Limited, Defendant. Citation. Filed and entered Aug. 24, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

272 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, *District of Montana, ss:*

I, George W. Sproule, clerk of the United States Circuit Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, that the foregoing volume, consisting of two hundred and forty-one (241) pages, numbered consecutively from one to two hundred and forty-one (241), is a true and correct transcript of the pleadings, process, records, orders, judgment, and all proceedings had in said cause and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause with admission of service thereof.

I further certify that the cost of the transcript of record amounts to the sum of one hundred and eight and 65/100 dollars ($108.65), and has been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court at Helena, Montana, this 25th day of August, A. D. 1905.

[SEAL.] GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW,
Deputy Clerk.

273 [Endorsed:] No. 1240. United States Circuit Court of Appeals for the Ninth Circuit. The Montana Mining Company, Limited, Plaintiff in Error, *vs.* The St. Louis Mining and Milling Company of Montana, Defendant in Error. Transcript of Record. Error to the Circuit Court of the United States for the District of Montana. Filed September 1, 1905. F. D. Monckton, Clerk.

EXHIBIT "PATENT."

General Land Office, No. 12338.

Mineral Certificate, No. 1245.

THE UNITED STATES OF AMERICA:

To All to Whom These Presents Shall Come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the Plat and Field Notes of survey and the Certificate, No. 1245, of the Register of the Land Office at Helena, in the Territory of Montana, accompanied by other evidence, whereby it appears that Charles F. Mayger did, on the twenty-first day of August, A. D. 1885, duly enter and pay for that certain mining claim or premises, known as the St. Louis lode mining and mill-site claim, designated by the Surveyor General as Lots Nos. 54 and 55A and 55B, embracing a portion of townships eleven and twelve north of ranges six west of the
274 principal meridian, in the Mining District, in the County of Lewis and Clarke, and Territory of Montana, in the District of Lands subject to sale at Helena, and bounded, described and platted as follows, with magnetic variation as hereinafter stated.

Beginning for the description of the lot- Nos. 54 and 55A, at corner No. 1, a granite stone 16 x 12 x 12 inches, marked 1 M. C. 54, a mound of stones alongside, from which the quarter section corner on the south boundary of section thirty-six, in township twelve north of range six west of the Principal meridian, bears south seventy-four degrees and fifteen minutes east three hundred and fifty-three feet distant.

Thence, first course, magnetic variation nineteen degrees east, south twenty-one degrees and fifteen minutes west one hundred and two feet intersect line between townships eleven and twelve north of range six west, a granite stone 15 x 14 x 12 inches, marked 54, M. C. 55A; four hundred and fifty feet to a point, from which a shaft bears north sixty-seven degrees west two hundred and eighty-five feet distant, and from said shaft an open cut 3 by 5 feet, one hundred feet long, runs south fifty-four degrees east; six hundred and fifty-five feet to a point, from which a shaft bears west one hundred and fifty-three feet distant; one thousand and ninety-seven feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked 2 M. C. 55A, a mound of stones alongside, from which the center of discovery shaft bears north thirty-five degrees and thirty minutes, west two hundred and eighty-nine feet distant.

275 Thence, second course, magnetic variation nineteen degrees east, south fifty-one degrees and thirty minutes west four hundred and three feet to corner No. 3, a slate stone 14 x 10 x 4 inches, marked 3 M. C. 55A, a mound of stones alongside, from

which the southeast location corner bears south ten degrees east four hundred and thirty-five feet distant.

Thence, third course, magnetic variation nineteen degrees east, north forty-five degrees and thirty minutes west six hundred feet to corner No. 4, a granite stone 20 x 8 x 7 inches, marked 4 M. C. 55A, a mound of stones alongside, from which the southwest location corner bears south seventy-nine degrees west one hundred and eighty-two feet distant.

Thence, fourth course, magnetic variation nineteen degrees east, north fifty-one degrees and fifteen minutes east four hundred and twenty-five feet to corner No. 5, a granite stone 16 x 12 x 6 inches, marked 5 M. C. 55A, a mound of stones alongside.

Thence, fifth course, magnetic variation nineteen degrees east, north twenty-one degrees and forty-five minutes east five hundred and twenty-nine and seven-tenths feet intersect said township line, a granite stone 18 x 14 x 7 inches, marked 55A, 54 M. C., one thousand and sixty-nine feet to corner No. 6, a granite stone 18 x 12 x 6 inches, marked 6. M. C. 54, from which a fir tree thirteen inches in diameter marked 6 M. C. 54 B. T. bears north fifteen degrees east twenty-four feet distant, and a pine tree five inches in diameter marked 6 M. C. 54 B. T. bears south fifty-four degrees east twenty-one and five-tenths feet distant.

276 Thence, sixth course, magnetic variation nineteen degrees east, south forty-five degrees and thirty minutes east five hundred and fifteen and five tenths feet to corner No. 1 of lot No. 40, the Drumlummon lode claim; five hundred and seventy-nine feet to corner No. 1, the place of beginning; said lot Nos. 54 and 55A extending one thousand five hundred feet in length along said St. Louis vein or lode, the granted premises in said lot containing eighteen acres and ninety-three hundredths of an acre.

Beginning for the description of the lot No. 55B, at corner No. 1, a granite stone 18 x 12 x 6 inches, marked 1 M. C. 55B, a mound of stones alongside, from which corner No. 4 of lot No. 55A, hereinbefore described, bears south thirty-five degrees and nine minutes east four hundred and ninety-eight and seven tenths feet distant.

Thence, first course, magnetic variation nineteen degrees east, north twenty-seven degrees east two hundred and ninety-five feet to corner No. 2, a granite stone 14 x 12 x 12 inches, marked 2 M. C. 55B, a mound of stones alongside.

Thence, second course, magnetic variation nineteen degrees and thirty minutes east, north sixty-eight degrees and forty-five minutes west two hundred and thirty-one feet to corner No. 3, a granite stone 18 x 14 x 5 inches, marked 3 M. C. 55B, a mound of stones

277 alongside, from which the northwest location corner bears north thirty-degrees east sixteen feet distant.

Thence, third course, magnetic variation nineteen degrees and thirty minutes east, south thirty-one degrees and thirty minutes west two hundred and thirty feet to corner No. 4, a granite stone 18 x 12 x 8 inches, marked 4—55B and 3—37 M. C.—38, a mound of stones alongside, being also corner No. 26 of lot- Nos. 37 and 38,

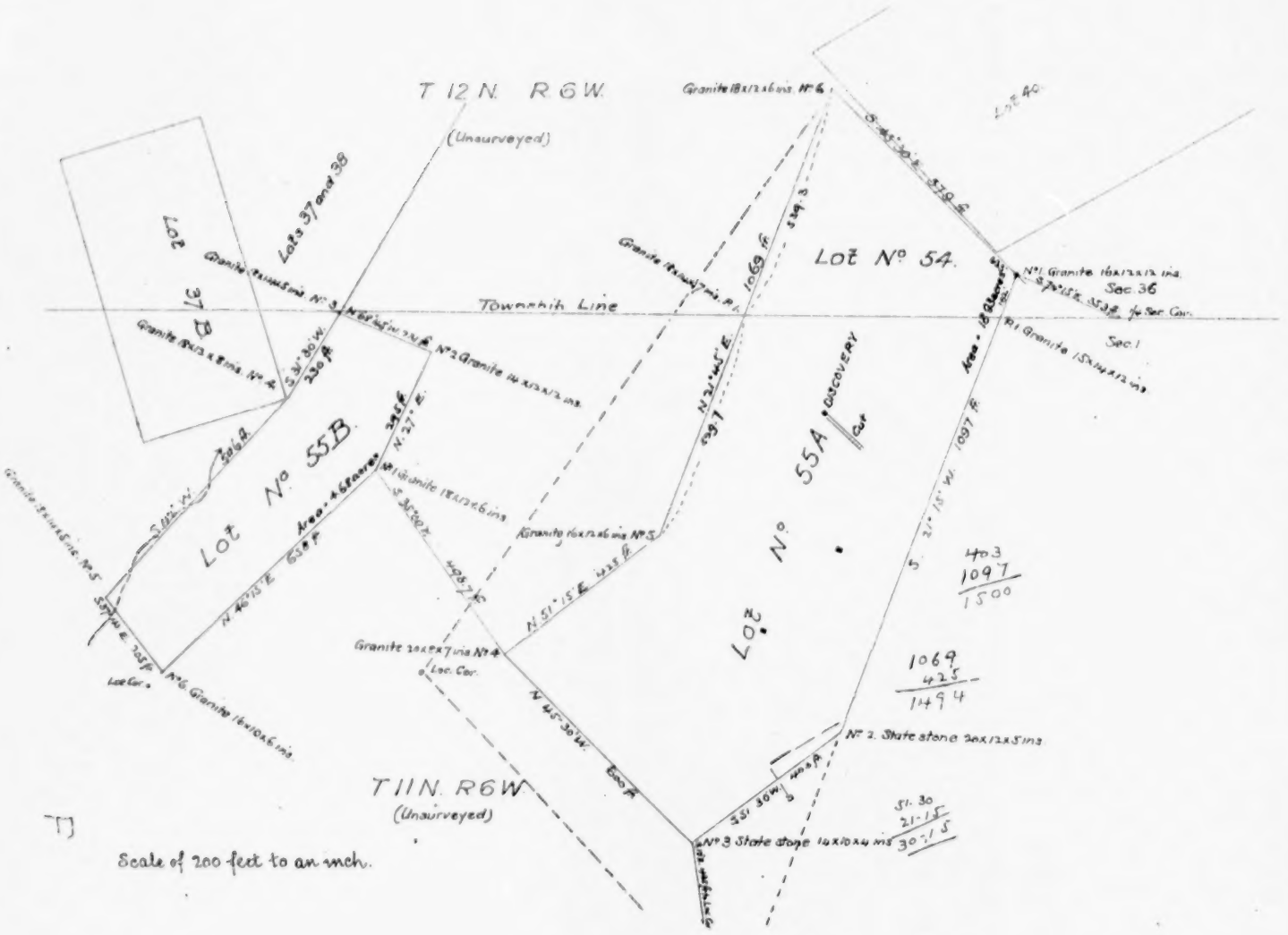
a placer claim, and corner No. 3 of lot No. 37B, a millsite claim, from which corner No. 1 of this claim, bears south fifty-three degrees and thirty minutes east two hundred and fifty-one feet distant.

Thence, fourth course, magnetic variation nineteen degrees and thirty minutes east, south forty-two degrees west two hundred and sixty feet to brook; three hundred and twenty feet said brook; five hundred and twenty feet said brook; five hundred and ninety-six feet to corner No. 5, a granite stone 18 x 14 x 5 inches, marked 5 M. C. 55B, a mound of stones alongside.

Thence, fifth course, magnetic variation nineteen degrees and thirty minutes east, south thirty-seven degrees and forty-five minutes east thirty-three feet brook; two hundred and five feet to corner No. 6, a granite stone 16 x 10 x 6 inches, marked 6 M. C. 55B, a mound of stones alongside, from which the southeast location corner bears south forty-three degrees and thirty minutes west forty-five feet distant.

278 Thence, sixth course, magnetic variation nineteen degrees and thirty minutes east, north forty-six degrees and fifteen minutes east six hundred and fifty-eight feet to corner No. 1, the place of beginning, containing four acres and sixty-eight hundredths of an acre, which together with the area embraced in the granted premises in said lot- Nos. 54 and 55A aggregates twenty-three acres and sixty-one hundredths of an acre of land, more or less, as represented by yellow shading on the following plat.

(Here follows diagram marked page 279.)


T 12 N. R 6 W.
(Unsurveyed)
Granite 18x12x6 ins. No 6
Lot 40
S. 45° 30' E. 379.6
Lot No 54.
No 1 Granite 16x12x12 ins.
Sec 36
S. 74° 15' E. 553.8 ft. to Sec. Cor.
No 1 Granite 15x14x12 ins.
Sec. 1
Township Line
Lots 37 and 38
Lot 37 B
Granite 24x12x8 ins. No 3
N. 68° 45' W. 234 ft.
No 2 Granite 16 x 12 x 12 ins.
S. 38° 30' W. 230 ft.
Granite 18x12x8 ins. No 4
Lot No 55 B.
Area - 4.6 Acres
N. 27° E. 395 ft.
No 1 Granite 18x12x6 ins.
S. 38° 30' E. 498.7 ft.
Granite 16x12x6 ins No 5
N. 24° 45' E. 693.1 ft.
Area - 4.6 Acres
Lot No 55 A
Discovery Cor
S. 21° 15' W. 697 ft.
N. 46° 15' E. 658 ft.
N. 51° 15' E. 435 ft.
Granite 20x12x7 ins No 4
Loc. Cor.
Lot No
403
1097
1500
1069
425
1494
No 2. Sate stone 20x12x5 ins
N. 45° 30' W. 600 ft.
S. 35° 30' W. 405 ft.
No 3 State stone 14x10x4 ins
51. 30
21. 15
30. 15
T 11 N. R 6 W.
(Unsurveyed)
Scale of 200 feet to an inch.

280 & 281 Now know ye, That there is therefore hereby granted by the United States unto the said Charles F. Mayger, and to his heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, all that portion of the said St. Louis vein, lode, or ledge, and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which are inside of the surface boundary lines of said granted premises in said Lot- Nos. 54 and 55A extended downward vertically, although such veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises: Provided, That the right of possession to such outside parts of said veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot- Nos. 54 and 55A, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes, or ledges: And provided further, That nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to his heirs and assigns forever; subject, nevertheless to the above-mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception
282 of the surface, may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Third. That in the absence of necessary legislation by Congress, the Legislature of Montana may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the twenty-second day of July, in the year of our Lord one thousand eight
283 hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

By the President:

[SEAL.] GROVER CLEVELAND,
By M. McKEARR, *Secretary.*
ROBT W. ROSS,
Recorder of the General Land Office.

Recorded Vol. 151, Pages 358 to 364, inclusive.
Examined.
No. 286A. United States Patent, No. 3, for Charles F. Mayger.

STATE OF MONTANA, *County of Lewis and Clarke, ss:*

I hereby certify that the within instrument was filed in my office on the 5th day of Dec. A. D. 1889, at 55 min. past 4 o'clock, P. M., and recorded on page 302 of Book 1, of the U. S. Records of Lewis and Clarke County, Montana Territory.

J. S. TOOKER,
County Recorder,
By F. W. COOMBS, *Deputy.*

Fees, $7.50, pd.

284 Filed May 8th, 1893.

GEO. W. SPROULE, *Clerk.*

Filed Sept. 28, 1893.

GEO. W. SPROULE, *Clerk.*

Pl'ff's Ex. 11. Filed June 15, 1905.

GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW, *Deputy.*

No. 1240. United States Circuit Court of Appeals for the Ninth Circuit. Exhibit "Patent." Received Sept. 1, 1905. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

285 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and eighty-four (284) pages, numbered from one (1) to two hundred and eighty-four (284), inclusive, including the index and cover thereto, to be a true copy of the printed transcript of record upon writ of error to the Circuit Court of the United States for the District of Montana, in the above-entitled case, as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United

States Circuit Court of Appeals for the Ninth Circuit and as said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 17th day of September, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

286 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

287 At a stated term, to wit: the October term A. D. 1905 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Tuesday the tenth day of October in the year of our Lord one thousand, nine hundred and five.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Order on Hearing.

Ordered, cause argued by Mr. W. E. Cullen, counsel for the plaintiff in error, and Mr. M. S. Gunn, counsel for the defendant in error, and continued to to-morrow for further argument.

288 At a stated term, to wit: the October term A. D. 1905 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Wednesday the eleventh day of October in the year of our Lord one thousand, nine hundred and five.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Order of Submission.

Ordered, cause further argued by Messrs. M. S. Gunn and Arthur Brown, counsel for the defendant in error, and Mr. Charles J. Hughes, Jr., counsel for the plaintiff in error, and submitted to the Court for consideration and decision.

289 In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Monday, August 13, 1906.

In Error to the Circuit Court of the District of Montana.

This was an action brought in the Circuit Court of the United States for the District of Montana by The St. Louis Mining and Milling Company, a Montana corporation, defendant in error, against The Montana Mining Company, Limited, a corporation organized under the laws of Great Britain, plaintiff in error, to recover damages for trespass upon a vein of mineral, the top or apex of which lies inside the surface lines of the St. Louis claim, but which vein in its downward course, departing from a perpendicular, crosses the vertical side lines of the St. Louis claim and enters beneath the surface of the adjoining claim owned by the Montana Company, where the trespass upon the vein by the Montana Company is charged
290 to have been committed and the appropriation by that company of large quantities of valuable ore extracted from the vein.

The first paragraph of the Second Amended and Supplemental Complaint alleged the corporate character of the plaintiff and defendant.

In the second paragraph of the Complaint, it was alleged that at the times mentioned therein the plaintiff was "the owner of, entitled to, and in the actual possession and occupation of that certain quartz

lode mining claim known as the St. Louis Quartz Lode Mining Claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis Lode Mining Claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis Quartz Mining Claim."

The Complaint contained a full description of this claim by monuments, courses and distances, concluding with this exception:

"Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known as designated as the Nine Hour lode mining claim."

In the third paragraph it was alleged: "That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode Mining Claim, situate and being east of the said St. Louis Lode Mining Claim, and including the 30 foot strip or compromise ground aforesaid, and that the discovery, location and recordation of the said St. Louis Lode Mining Claim and the United States patent
291 therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour Lode Mining Claim."

In the fourth paragraph it was alleged: "That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis Mining Claim is to the east and dips under and beneath the said Nine Hour Lode Mining Claim, including the said thirty-foot strip or the compromise ground, which is a part and portion of the said Nine Hour Quartz Lode Mining Claim, which said portion of said vein has its top or apex within the said St. Louis Mining Claim as follows, to wit: Commencing at a projected parallel end line of said St. Louis Quartz Lode Mining Claim, at a point on the east side line thereof, between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging wall of said vein, lode, or lodge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz Lode Mining Claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of said St. Louis Quartz Lode Mining Claim; thence, from where said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512 7/10 feet to a point, being the intersection of the said east side line of said St. Louis Quartz Lode Mining Claim, between corners Nos. 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 50 degrees 50 minutes west 108 feet and along the west line of the said thirty-foot strip, to a projected parallel end line of said St. Louis Quartz Lode Mining

Claim, extended vertically downward, which passes through
292 the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty-foot strip.

"That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot-wall of the said vein passes out of the east side line of the said St. Louis Mining Claim."

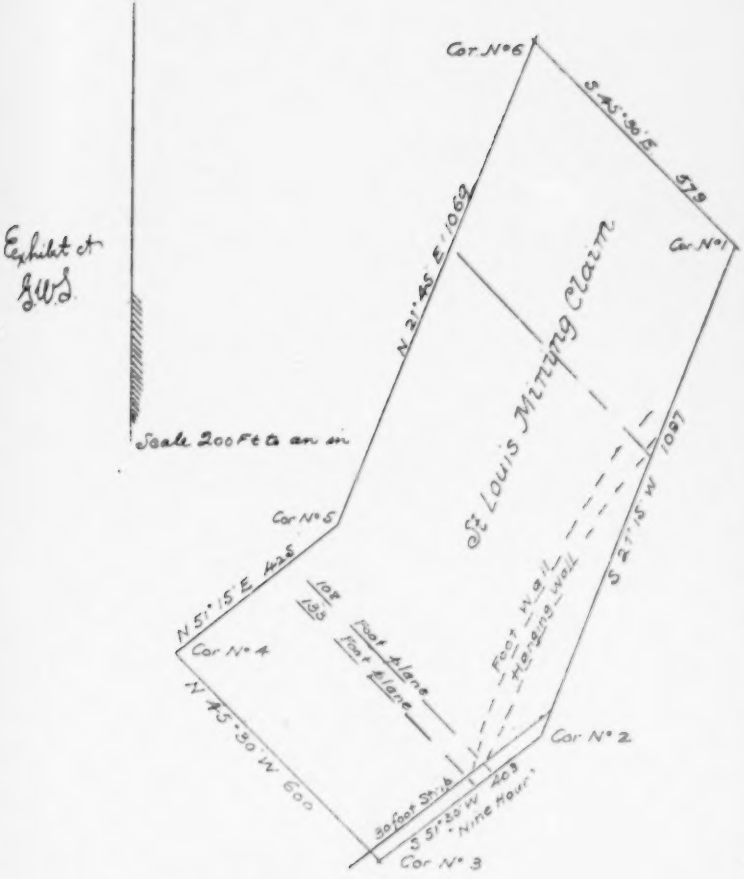
In the fifth paragraph it was alleged: "That notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the thirtieth day of June, 1893, knowingly, wrongfully, and unlawfully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis Mining Claim, and commenced extracting quartz, rock and ore therefrom, and removing the same, and converting it to his own use and benefit, and are now still removing and converting the same, which said quartz, rock and ore is of the value of two hundred thousand dollars; on account thereof this plaintiff has been damaged in said sum.

"That since the filing of the original complaint herein, and up to the twenty-sixth day of June, 1899, said defendant, Montana Mining Company, Limited, has extracted a large quantity of quartz, rock and ore from the premises and veins above described and within the planes aforesaid, and converted the same and the minerals therein contained to their own use, of the value of fifty thousand dollars, and to the damage of this plaintiff in said sum.

"Wherefore, plaintiff prays judgment for the said sum of two hundred and fifty thousand dollars, together with its costs and disbursements in this behalf expended."

293 A map or plat showing the point at which the said vein enters said St. Louis Lode Mining Claim as described in the complaint, and the point where the same departs therefrom upon the east line of said claim, is attached to the complaint, marked Exhibit "A" and made a part thereof. A copy of this map is annexed to this opinion for reference.

(Here follows map marked page 294.)



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} p. 294

295 The last clause of the Complaint relates to the damages alleged to have been sustained by the plaintiff after filing the original complaint and up to the 26th day of June, 1899, which were originally stated as being fifty thousand dollars, and the total damages as two hundred and fifty thousand dollars. This clause was amended by leave of the Court at the close of the last trial, on June 30, 1905, so as to change the $50,000.00 therein mentioned to $400,000.00, making the entire claim for damages $600,000.00.

The Montana Mining Company answered this Complaint June 30, 1899, admitting the allegations contained in paragraphs one, two, and three, and setting up the defense of an estoppel by deed, as follows:

"And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached, marked "Exhibit "A," and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis Lode Mining Claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey
296 the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said defendant and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or about the sixth day of September, A. D. 1894, commenced an action in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis & Clarke, wherein this defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the first day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged, and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute and deliver to this defendant a good and sufficient conveyance in fee simple absolute, free from all encumbrances for the premises mentioned and described in the complaint

in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order and decree the said plaintiff, on or about the first day of July, A. D. 1895, made and executed a deed to this defendant of and for the said premises and of all the mineral therein contained; and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereunto annexed, marked Exhibit "B" and made a part of this answer. And this defendant avers that in and by the said proceedings and the said
297 deed the said plaintiff is estopped from claiming any part of the said compromise ground or thirty-foot strip aforesaid, or any mineral contained therein.

"Wherefore, having fully answered, the defendant prays to be hence dismissed without day, and for its costs in this behalf expended."

To this answer the plaintiff filed a replication, in which it was denied that plaintiff was estopped for any of the causes or reasons set up in the said answer, or any other cause or reason, from claiming any of the mineral found or that might be at any time thereafter found in said thirty-foot strip or compromise ground. Plaintiff admitted the execution of the bond as stated in the answer and averred that the same was executed and made on account of an application of the said Mayger for a patent to the said St. Louis Lode Mining Claim, and on account of an adverse claim interposed by the said defendant's predecessor in interest of said thirty-foot strip or compromise ground as being a part of what was known as the Nine Hour Quartz Lode Mining Claim. Plaintiff admitted that the said Mayger agreed to convey said thirty-foot strip or compromise piece of ground, with all the minerals therein contained, to the predecessor in interest of the said defendant, and averred that the said claim of plaintiff comprised no minerals contained in or beneath said thirty-foot strip or compromise ground, except such as were contained in leads, lodes, or ledges which had their tops or apexes within the St. Louis Quartz Lode Mining Claim, exclusive of said thirty-foot strip or compromise ground. The plaintiff further averred that it was seeking to recover only such quartz, rock, or ore, and the value thereof, and the damages for the removal and conversion of the same, as comprised lodes, leads, or ledges having their tops or apexes within the boundary lines of the said
298 St. Louis Lode Mining Claim, exclusive of said thirty-foot strip or compromise ground.

Plaintiff admitted that Mayger obtained a patent for the said thirty-foot strip or compromise ground, but denied that any conveyance was made by him to plaintiff to defraud any one, and averred that all matters in relation thereto had been concluded by the judgment of the court and the deed mentioned in defendant's answer executed in pursuance thereof; that the thirty-foot strip or compromise ground was at all times a part and portion of the quartz lode mining claim known as the Nine Hour claim; that the same was never a part or portion of the St. Louis Quartz Lode mining claim; that in the action in the district court of the first Judicial district of the State of Montana in and for the county of Lewis

& Clarke, wherein the defendant was plaintiff and plaintiff and Charles Mayger were defendants, the action was based upon the agreement mentioned in said answer, and was brought for the purpose of compelling the defendants therein in accordance with said agreement, to execute and deliver to the plaintiff therein a good and sufficient deed for the premises known as the thirty-foot strip or compromise ground; that the court found and determined as a matter of fact that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour Lode mining claim, and was by the parties to said agreement agreed to be a part thereof, and that the said agreement was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim, the boundary of which claims had been and was at the time of the execution of said agreement in conflict, and concerning which a controversy then existed between the parties to said agreement; that the deed mentioned in the Answer is the deed which the court adjudged in said action should be executed for the purpose
299 of performing the agreement above referred to; that said deed conveyed no other title than such as was attached and incident to the said thirty-foot strip or compromise ground, and that the minerals therein contained were intended to comprise and did comprise all such minerals as were contained in veins, lodes, or ledges having their tops or apexes inside of said thirty-foot strip.

The controversy between the plaintiff and the defendant, as stated in these pleadings, was whether the deed executed and delivered by the plaintiff on the first day of July, 1895, conveying the thirty-foot strip or compromise ground to the defendant, included the extralateral right of a vein apexing within the boundaries of the St. Louis claim but passing on its downward course beyond the vertical side line of such claim into the thirty-foot strip or compromise ground, and if this deed did not include such extralateral right, then the extent of such vein and the extralateral right in the thirty-foot strip or compromise ground, that it to say, where as in this case, the vein has a width of twenty-five feet and crosses the vertical side line at an angle; whether the extralateral right ceases at the point where a part of the apex of the vein represented by the hanging wall crosses the side line, or whether the right adheres to the vein until its entire apex represented by the foot-wall has crossed the side line of the claim into the adjoining ground.

The vein described in these pleadings as having its apex within the surface location of the St. Louis mining claim is shown on the map or plat attached to the complaint. The apex of the vein, as described in paragraph four of the complaint, commences on a projected parallel end line "at a point from which corner No. 1, being the northeast corner of the said St. Louis Quartz Lode Mining Claim, bears north 12 degrees 15 minutes east, distant 520
300 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line 5 feet west of the east side line of said St. Louis Lode Mining Claim," thence the

vein continues within the surface boundaries of the St. Louis mining claim in a general southerly direction to the line of the 108-foot plane, which designates the point where the hanging wall of the vein crosses the vertical side line of the St. Louis claim, and the line of the 133-foot plane designates the point where the foot-wall of the same vein crosses the same side line.

In the course of the trial in the circuit court this vein was designated by the witness as the Drum Lummon vein, and it has since been known in the proceedings by that name.

Upon the issues presented by the pleadings the case was tried by the Court and a jury, and on August 12, 1899, a verdict was rendered in favor of the plaintiff for $23,209. On August 16, 1899, a judgment was entered thereon. The Montana Company being dissatisfied with this judgment, sued out a writ of error October 7, 1899, and brought the case to this Court for review.

It was contended on behalf of the Montana Company, as grounds for reversal of the judgment, among other things, (1) that the complaint did not state a cause of action, and (2) that by the execution of the bond, the entry of the judgment enjoining specific performance of the conditions of the bond, and the execution of the deed of conveyance mentioned in the answer, the St. Louis Company was estopped from claiming any ore in the thirty-foot strip or compromise ground. This court held that the allegations of the complaint that the plaintiff was the owner and in possession of the St. Louis claim and of the ore and precious metals contained in any and all veins, lodes, ledges, and mineral-bearing rock
301 through their entire depth, the tops or apexes of which were within the surface lines of the St. Louis Claim; that the strip of land beneath the surface of which the ores in controversy were mined was located east of the east side line of said claim; that the dip of one of the veins having a portion of its apex inside the surface lines of the St. Louis claim was to the east and dipped under and beneath the thirty-foot strip of the Nine Hour claim, and that from this vein so apexing within the St. Louis claim and extending beneath the Nine Hour claim the ores in controversy had been mined by defendant, were sufficient, in the absence of a demurrer, to support a judgment in favor of the defendant for the conversion of such ores. This court also held that the conveyance by the St. Louis Company to the Montana Company of the land in controversy, in pursuance of a decree of court, had no other effect than to fix the surface boundary of the side line between the two claims in accordance with the original contention of the grantee, and did not deprive the grantor of any extralateral right under the ground so conveyed.

In accordance with this opinion the judgment of the Circuit Court was affirmed May 14, 1900 (102 Fed., 430).

At the trial in the circuit court the St. Louis Company was restricted by the court to the damages it sustained by reason of the trespass of the defendant upon that portion of the Drum Lummon vein under the thirty-foot strip or compromise ground and under the Nine Hour claim between lines projected downward along the

dip of the vein from the 520-foot plane and the 108-foot plane, as represented on the map or plat attached to the complaint. But plaintiff offered to prove in addition the amount of ore taken by defendant from that portion of the vein the apex of which was divided by the western boundary of the thirty-foot strip or compromise ground between points represented on the same map or plat as the 108-foot plane and the 133-foot plane, which part
302 of the vein on its downward course also dipped beneath the thirty-foot strip or compromise ground and under the Nine Hour claim. The court refused to admit this testimony, and the value of the ore taken from this point of the Drum Lummon vein was not included in the judgment for the plaintiff. The plaintiff, being dissatisfied with the judgment because of the ruling of the court with respect to this testimony and the omission from the judgment of the value of the ore taken from this part of the vein, sued out a cross-writ of error January 30, 1900, and the case was brought here for review upon that question. The court in deciding this feature of the case, stated the question to be:

"When a secondary or accidental vein crosses the common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong?"

After discussing the question, the court said:

"Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing within the senior location until it has wholly passed beyond its side line. It follows that the court below erred in its refusal to admit the evidence offered as to the value of the ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes, and the cause is therefore remanded for a new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated."

303 In accordance with this opinion, the judgment of the Circuit Court was reversed October 8, 1900, 104 Fed. 664.

To review these two separate judgments of this Court the Montana Company sued out two writs of error from the Supreme Court of the United States. In that Court both writs of error were dismissed, on the ground that the judgment of this Court reversing the judgment of the Circuit court in the second case, operated to reverse the prior judgment of affirmance in the first case, and there being no final judgment in the case, the jurisdiction of the Supreme Court did not obtain (186 U. S. 24).

Upon the coming down of the mandate from the Supreme Court, this Court, October 8, 1902, entered a judgment that the judgments theretofore entered be vacated and set aside and in lieu thereof it was ordered and adjudged that the judgment of the Circuit Court be reversed with costs, and the cause remanded to the said Circuit Court

for a new trial, and a mandate was issued accordingly. Upon the new trial before the Court and a jury, the Court followed the law as declared by this Court in the two opinions rendered in the case, and a verdict was returned in favor of the plaintiff for $195,000, upon which a judgment was entered by the Court. To reverse this judgment the case is here upon writ of error.

Charles J. Hughes, Jr., William Wallace, Jr., W. E. Cullen, and W. E. Cullen, Jr., for Plaintiff in Error.

Bach & Wight, John B. Clayberg, Arthur Brown and M. S. Gunn, for Defendants in Error.

304 Before Gilbert, Ross, and Morrow, Circuit Judges.

MORROW, *Circuit Judge:*

It is contended by the plaintiff in error that the judgment of this court entered October 8, 1902, set the entire case at large, and upon the second trial relieved it from the rule prevailing in the United States Courts, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit.

In appellate proceedings the rule was stated by the Supreme Court in Browler *v.* McArthur, 7 Wheat., 58, as follows:

"It was too late to grant a rehearing in a cause, after it had been remitted to the court below, to carry into effect the decree of this court, according to its mandate; and that a subsequent appeal from the Circuit Court, for supposed error in carrying into effect such mandate, brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree."

In Sibbald *v.* United States, 12 Pet., 488, 492, a motion was made to reform a mandate issued by the court at a previous term so as to conform the same to the opinion given by the court at that time. In granting the motion the court stated its opinion of the course prescribed by law for it to take after final action upon a case brought within its appellate jurisdiction. The Court said:

"Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other pur-
305 pose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermediate with it, further than to settle so much as has been remanded."

In Supervisors *v.* Kennicott, 94 U. S. 498, the Supreme Court on a former appeal from the Circuit Court for the Southern District of Illinois, had decided that the mortgage in controversy in the case was valid in favor of *bona fide* holders of the bonds it was given to secure, and that the complainants were entitled to a decree for the amount of the bonds held by them. The direction of the Supreme Court, as stated in the opinion in that case, was that the judgment of the Cir-

cuit Court must be reversed and a new trial had. In accordance with this direction the Circuit Court upon the new trial appears to have opened up the case for a further hearing upon issues presented and decided upon the first appeal. On the second appeal the Supreme Court refused to consider these questions, referring to the fact that technically there could be no "new trial" in a suit in equity, and holding that the mandate of the Court was to be interpreted according to the subject-matter of the proceedings before the Supreme Court, and if possible so as not to cause injustice; that it was proper to inquire what must have been intended by the use of the term "new trial" in the decree, since it could not have its ordinary meaning, and for the purpose resort might be had to the opinion delivered at the time of the decree, citing the case of West *v.* Brasher, 14 Pet. 51. In refusing on the second appeal to consider questions decided on the first appeal, the court said:

"These questions are, therefore, no longer open; for it is settled in this court, that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration only the
306 proceedings of the Circuit Court, after the mandate of this court."

In Roberts *v.* Cooper, 20 How., 481, the case was at law and was in the Supreme Court on a writ of error. On a previous writ of error the case had been remanded for a new trial (Cooper *v.* Roberts, 18 How, 173), and it was contended there, as it is here, that on a review of the case the party is to be heard at large both as to the law and fact. With respect to this contention the court said:

"On the last trial, the Circuit Court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members."

In Republican Min. Co. *v.* Tyler Min. Co., 79 Fed., 733, this Court had before it the question whether the owner of a mining
307 claim was deprived of the extralateral right pertaining to a vein apexing within the boundaries of his claim because the vein, although entering the claim through an end line and running its course lengthwise nearly parallel with the side lines for the greater

part of the length of the claim, passes out of the claim across a side line before it reaches the other end line. This question had been decided by the court upon a previous writ of error, in favor of the extra-lateral right claimed by the owner of the vein, and accordingly the court held that where a case has been brought before an appellate court and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; that the appellate court is not bound to consider any of the questions which were before the court on the first writ of error. In the case of the Mutual Reserve Fund Life Ass'n *v.* Beatty, 93 Fed., 747, this Court again referred to this rule in the following language:

"It is clear that the decision of the circuit court of appeals upon the former writ of error is the law of the case, and, so far as the court has considered the questions at issue, they must be deemed to be *res judicata*, and not open for review at this time."

In Thompson *v.* Maxwell Land Grant Co., 168 U. S., 451, 456, the Supreme Court stated the rule with respect to prior decisions and the authority of the opinions of the court in determining what has been decided, as follows:

"It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. * * *

We take judicial notice of our own opinions, and although
308 the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered and what has become settled for further disposition of the case."

In the present case this Court, on May 14, 1900, entered a judgment of affirmance in accordance with the opinion of the court in the case entitled in this Court Montana Min. Co. *v.* St. Louis Min. & Mill. Co. (102 Fed. 430); and on October 8, 1900, it entered a judgment of reversal in accordance with the opinion of the Court in the case entitled in this Court St. Louis Min. & Mill. Co. *v.* Montana Min. Co. (104 Fed., 664), both cases being writs of error from the same judgment in the court below.

The Supreme Court of the United States was of the opinion that the judgment in the last case operated to reverse the prior judgment of affirmance in the first case (186 U. S. 24). In accordance with this opinion, this Court entered a single judgment of reversal on October 8, 1902, and directed that a new trial be had. The mandate directed:

"That such new trial and further proceedings be had in said cause in accordance with the judgment of this court * * * and according to right and justice and the law of the United States ought to be had."

There is certainly nothing in this judgment to indicate a purpose on the part of the court to set aside its decisions rendered in the case. On the contrary, the fact that these decisions were not withdrawn or recalled and the case set at large, indicates that the court has no

intention of doing so. The decisions were allowed to stand as the opinions of this Court upon the issues presented by the writs of error and hence became the law of the case. The fact that the mandate does not contain a reference to these opinions does not de-
309 termine that they are without authority.

In the case of Empire State-Idaho Min. & Dev. Co. *v.* Hanley, 136 Fed., 99, this Court answered a similar objection in the following language:

"The fact that the views of the court so expressed in the opinion are not contained in the mandate which issued to the lower court renders them no less conclusive as the law of the case" citing Thompson *v.* Maxwell Land Grant Co., 168 U. S. 451.

We think that all questions considered and determined in our former decisions upon prior writs of error have become the law of the case; that the lower court was right in refusing to disregard such decisions, and that this court is without authority, upon this last writ of error, to reconsider the questions so determined.

We, therefore, pass over the assignments of error relating to questions which appear to have been determined in our previous decisions and come to the new questions raised upon the last trial.

After the taking of testimony had been concluded the plaintiff moved the court for leave to amend the *ad damnum* clause of the complaint, so as to change the allegation claiming $50,000 damages to an allegation claiming $400,000 damages. To this amendment the defendant objected, and the Court overruled the objection. The ruling is assigned as error.

Amendment to pleadings are within the discretion of the Court, and error will not lie to the granting or refusal thereof. Section 954 Revised Statutes; Chapman *v.* Barney, 129 U. S., 677.

The remaining assignments of error relate to the charge of the Court to the jury. It appears from the Transcript of Record that during the argument of respective counsel the Court directed the attention of counsel on both sides to Rule 58 of the court and
310 the decision of this Court in Montana Copper Company *v.* Van Buren, 133 Fed., 1, and Harvey *v.* Tyler, 2 Wall., 328, concerning instructions to juries. These decisions require that exceptions to instructions, to be available on writ of error, must be taken to each instruction specifically, and not to the instructions as a whole, and that the record must show that they were taken and the points of exception designated while the jury were at the bar; that it is improper practice to permit formal exceptions to be then noted and the specifications of objections to be supplied in the record later, the object of the rule being that the attention of the trial court shall be called to the precise point to which exception is taken while it may be remedied by the Court and before the case is finally submitted to the jury.

Rule 58 of the circuit court for the district of Montana appears to be the same as Rule 58 of the circuit court for the northern district of California, which permits exceptions to the charge or a refusal to give as a part of such charge instructions requested in writing to be taken by any party by stating to the court, after the jury have

retired to consider their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs, or in any other convenient manner, the parts of the charge excepted to and the requested instruction the refusal to which is excepted to.

The record of the proceedings of the court with respect to instructions to the jury is as follows:

"After delivering the charge, the court, before the going out of the jury for the considering of their verdict, requested counsel to submit any exceptions they might have to the charge, and to the instructions requested and given or refused.

311 "Thereupon, before the jury retired, counsel for both parties retired to the judge's room with the charge of the court, which was in writing, in their possession, and prepared in writing such objections and exceptions to the charge and the several parts thereof, and to the refusals to charge, as they desired, and thereafter in court the defendant presented the following exceptions and none other, which were then and there received by the court, and signed and allowed before the jury retired."

The exceptions were as follows:

"The defendant, immediately after the court had charged the jury and before they had left their seats or retired to consider of their verdict, submitted in writing to the court its objections and exceptions to the said charge, and portions thereof, which objections were then and there severally overruled, and defendant then and there duly excepted. The defendant also submitted in writing herein its objections and exceptions to the charges offered by the defendant and refused, which objections were likewise severally overruled and defendant then and there duly excepted.

"Said objections and exceptions are respectively as follows, to wit:"

Then follow forty exceptions to the refusal of the court to give instructions as requested, and sixteen exceptions to instructions given by the court. This bill of exceptions concludes as follows:

"Notice of the foregoing exceptions are given by the defendant and are received and considered by the court before the going out of the jury on this 6th day of July, 1905.

(Signed) "WILLIAM H. HUNT, *Judge.*"

312 The verdict of the jury was returned July 7, 1905. The record contained a second bill of exceptions relating to instructions to the jury, proposed after the trial had closed, as follows:

"In defendant's proposed bill of exceptions, upon July 31, 1905, the defendant stated its exceptions to the charge given by the court, in the following language:"

Then follow ten objections to specific instructions of the court and a statement with respect to each objection that the court overruled the objection and gave the instruction. This part of the bill of exceptions concludes as follows:

"The Court declined to allow the exceptions as stated in the proposed bill of defendant, and directed that the bill incorporate the

exceptions and objections made and allowed before the jury retired, to which ruling of the court, the defendant then and there duly excepted."

Then follow eleven instructions which the defendant requested the court to charge the jury and which the Court refused, and the defendant excepted.

This second bill of exceptions was signed by the Judge and made a part of the record August 14, 1905.

The plaintiff in error contends that this second bill of exceptions, proposed after the close of the trial, may be taken and considered as a part of the bill of exceptions in the case, under Rule 58 of the Circuit Court. In United States *v.* Carey, 110 U. S., 51, the Supreme Court said:

"The rule is well established and of long standing that an exception to be of any avail must be taken at the trial. It may be reduced to form and signed afterwards, but the fact that it was seasonably taken must appear affirmatively in the record by a bill of ex-
313 ceptions duly allowed or otherwise."

In Beaver *v.* Taylor, 93 U. S., 46, 55, the Court said:

"One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so."

In Thiede *v.* Utah Territory, 159 U. S., 510, 522, the verdict in the lower court was returned on October 21. On November 2 counsel for defendant came into court and sought to save other exceptions to the charge. The court noted those exceptions, but declined to make any ruling on them. The Supreme Court said: "Obviously, they were too late."

It has been found that the proceedings connected with the taking of exceptions to the charge of the court in the hearing of the jury has sometimes caused the jury to form a wrong impression of the charge and its purpose. It has also frequently happened that after the jury has retired to deliberate upon their verdict they have returned into court and requested further instructions, and the court, in the absence of counsel, has given such instructions. Merchants' Exchange Bank *v.* McGraw, 76 Fed., 930, 936. Rule 58 of the Circuit Court was intended to provide for those two situations and cannot be construed as establishing a method of procedure in conflict with the long line of decisions of the Supreme Court of the United States, from Walton *v.* United States, 9 Wheat. 651 to Thiede *v.* Utah, *supra;* besides, the language of the rule does not justify such a construction. It was manifestly intended to permit exceptions to be taken to the instructions or the refusal to
314 give instructions after the jury had retired to consider their verdict where such a course would be in the interest of justice, and where instructions were given by the court in the absence of counsel, to permit exceptions to be taken as soon as practicable thereafter.

In the present case, after the judge had instructed the jury, in-

stead of sending the jury out, the judge retired to his chambers and there heard the exceptions to the charge out of the hearing of the jury. This action was in accordance with the spirit and purpose of the rule. It gave the parties ample opportunity to take exceptions without confusing the jury with the proceedings connected with the action of the Court in ruling upon a multitude of exceptions; but it was not intended by this permission, and the further provision that exceptions should be taken to the charge if practicable before the verdict had been returned, to give counsel the general permission to take exceptions to the charge after the close of the trial. Such permission would be contrary to the rule of procedure declared by the Supreme Court and by this Court in numerous cases. But, conceding that this rule was subject to the construction contended for by plaintiff in error, it was subject to another well established rule, that it is always in the power of a court to suspend its own rules or to except a particular case from their operation whenever the purpose of justice requires it. United States *v.* Breitling, 20 How., 252. This was manifestly such a case, and the action of the Court is to be commended rather than made a subject of criticism.

This second bill of exceptions cannot, therefore, be considered. It was not submitted in accordance with the instructions nor in accordance with the rule of the court.

315 In the first bill of exceptions many of the objections to the instructions of the court were noted in general terms, as, for example, that the instruction "does not correctly state the law," or is "contrary to law," or is "not sufficiently guarded," or is "misleading," or "inapplicable." These objections were not sufficiently specific and direct to call the attention of the court to the specific point claimed to be erroneous. They did not furnish the court with the information necessary to enable it to correct inaccurate, inadvertent or misleading expressions, if any such there were. (Merchants Exchange Bank *v.* McGraw, 76 Fed. 930, 936). Objections are also now urged to instructions which were not noted or presented to the court below in any form. None of these objections can now be considered.

In Paragraph 5 of the Instructions, the Court instructed the jury as follows:

"The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, betwen the 520 and 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

To this instruction the plaintiff in error interposed the objection (1) that the burden of proof never shifts as to extralateral rights for a discovery vein, and (2) that whoever has the burden is only

required to establish the fact by a fair preponderance of the
316 evidence, and (3) that this charge does not correctly state the law. The Court afterward instructed the jury, in Paragraph 7 as follows:

"It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis Quartz Lode Mining Claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence; but the defendant insists that the St. Louis Quartz Lode Mining Claim is not entitled to extralateral rights on the Drumlummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary or incidental vein of the St. Louis Claim."

There was no exception taken to this latter instruction. It was strictly in accordance with the pleadings, and the facts stated were admitted facts in the case, and, further than this, the previous decisions of this Court had determined that the St. Louis Company owned the mineral in this vein within the planes described, and such determination had become the law of the case.

The fifth paragraph of the instructions of the Court, to which objection is urged, could not, therefore, prejudice any right of the plaintiff in error. If the instruction is open to any criticism it would seem to be that the extralateral rights of the discovery vein were not in issue in the case. The only question in controversy under the pleadings was whether the St. Louis Company had conveyed the extralateral rights of the Drumlummon vein to the Montana Company by the deed of July 1, 1895, and if it had not, the damages
sustained by the St. Louis Company by reason of the trespass
317 of the Montana Company upon that vein. The first of these questions had been determined by this Court in favor of the St. Louis Company, and the second question was being determined in the trial then in progress. Whether the plaintiff had made a *prima facie* case of extralateral rights to either the discovery or Drumlummon veins was, therefore, immaterial. It had been determined upon the admitted facts in the case that the Drumlummon vein had such extralateral rights, and that was all that was necessary to be established to entitle the plaintiff to recover. The instruction that "The defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights" was also immaterial and did the plaintiff no injury, even if open to the objections urged against the instruction.

In Paragraph 8, the Court instructed the jury as follows:

"If you find that the course or strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or elsewhere, is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location.

"And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not neces-

sary, in order to give plaintiff extralateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis claim, between the 520 and 133-foot planes, that the discovery vein of the St. Louis Claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis claim between such planes generally lengthwise of the claim."

318 To this instruction the defendant excepted, on the ground that it was contrary to the law, in that no presumption whatever arises with reference to the course of the discovery vein.

The answer to the objection urged against Paragraph 5 of the Instructions, is a sufficient answer to this objection. If, however, the course, length, and dip of the discovery vein in the St. Louis claim were facts material to the question of the extralateral rights of the Drumlummon vein between the 520 and the 133-foot planes, then the Court covered the entire subject in Paragraph 9 of the Instructions, as follows:

"And if you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) runs lengthwise of the St. Louis claim between its side lines, and extends from the 520 to the 133-foot plane, and dips easterly, then plaintiff would be entitled to extralateral rights for that vein (or those veins) and to the like extralateral rights for all other veins having their apices within the same limits, and running in the same general direction."

To this instruction no exception was taken.

In Paragraph 25 the Court instructed the jury as follows:

"When you are told in this charge that the burden of proof upon any issue is upon either party to this action, you are to understand that such party must present evidence for your consideration which preponderates over the evidence of the other party upon that issue; and if, after due consideration of all the evidence introduced by the party having the burden of proof, it does not preponderate in

319 his favor, but that the evidence of each party upon the issue is equal, in your judgment, it is your duty to find such issue against the party having the burden of proof, under these instructions."

To this instruction no exception was taken.

All these instructions must be taken together. They qualify each other, and considered in that light, we do not think plaintiff was prejudiced by the instructions as to the burden of proof as given in Paragraphs 5 and 8 under any view of the case, either as to the law or the facts on which the case was submitted to the jury.

The use of the word "satisfaction," in Paragraphs 5 and 8 of the Instructions, is specifically objected to on the ground that it required the plaintiff in error to furnish a higher degree of proof than the law demands. What has been said about the burden of proof is applicable to this objection. Assuming that the word is objectionable, it did not injure the plaintiff in error as it related to a question not in issue on that trial.

The plaintiff in error contends that the instructions concerning the measure of damages were erroneous. The instructions objected to are contained in Paragraphs 11, 17, 18, 19, and 32 of the Instructions of the Court. To Paragraph 11 no exception was taken at the trial. In Paragraph 17 of the Instructions the Court instructed the jury as follows:

"If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use, quartz, rock and ore within the planes described in the complaint, from said vein, lead or lode, belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass, cannot be regarded as done without
320 notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injuries it has sustained."

To this instruction the defendant excepted, "for that it is contrary to law, is not sufficiently guarded and is misleading to the jury." Plaintiff in error contends that in this instruction the court instructed the jury that as to all ore dug after the commencement of the suit it was charged with knowledge and notice of the plaintiff's title, and therefore could not be an innocent or other than a wilful trespasser. The instruction does not appear to be open to such an interpretation. It was plainly intended to direct the attention of the jury to a question of evidence, and to instruct the jury that after the defendant had received notice and knowledge of plaintiff's claim of title to the ore in the vein in controversy the defendant should not be permitted to benefit by its trespass by placing or leaving evidence of the extent of such trespass uncertain. In other words, after notice, it was the duty of the defendant to keep a correct record of the quantity and value of the ore extracted, and, failing to do so, it was not to be benefited by this failure; the jury was to award just compensation for the damages sustained by the plaintiff by reason of the trespass. If this is not the correct interpretation of the instruction, it was the duty of the plaintiff in error in taking its execution at the trial to point out the precise point of the objection, that the Court might have made the instruction clear and direct with respect to the matter involved.
321 Failing to do this, the instruction is not now open to the objection urged against it.

Paragraph 18 of the instructions was as follows:

"The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the money expended in the running of levels, sinking shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the

ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant or any salaries paid to its officers, or any wages to any persons except those actually employed and engaged in extraction, transportation and milling of the ores in question."

To this instruction defendant excepted, "for that it is contrary to law and does not correctly define what mining and milling expenses may be deducted." Plaintiff in error now contends that instruction No. 11 (to which no exception was taken) and instruction No. 18 practically told the jury that a wilful trespasser could have no credit either for extraction or for cost of treatment or handling and that the court declined to advance the correct rule by refusing its requested instruction No. 43. This last instruction is not in the record and we are not advised as to its terms; and instruction No. 18 is not subject to the objection now urged against it.

Paragraph 19 of the instructions was as follows:

322 "When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it was a trespass upon said claim within its surface boundaries. And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis claim and the ore extracted therefrom."

To this instruction defendant excepted, "for the reason that it does not correctly define the possession plaintiff must have in order to support an action for trespass, and is not applicable to the facts proven and conceded in this case."

In Montana Min. Company *v.* St. Louis Min. & Mill. Company, 102 Fed. 430, 435 (one of the former decisions of this court in this case) this Court held that the possession of the surface of a mining claim is the possession of a vein or lode having its apex within the surface lines of the claim, although extending downward such vein may pass beyond the vertical side lines of the claim, and will support an action of trespass for the removal of ore from such vein beneath the surface of an adjoining claim.

Plaintiff in error contends that the Court was in error in

323 instructing the jury that the good faith and honest intent of the defendant in trespassing upon the vein in controversy and in extracting ore therefrom must be sufficient to excuse a similar trespass committed upon and within the surface boundaries of the

St. Louis claim; that the instruction denies to the plaintiff the benefit of the inference resulting from the work being done within its own surface, and directing the jury in effect to disregard all the peculiar facts bearing on the title to the compromise strip and the present litigation with reference thereto in evidence in that case when considering the issue of honest belief of ownership. The instruction did not direct the jury to disregard any fact tending to show good faith and honest intent. It simply stated that the evidence of good faith and honest intent must be the same in both cases, and this was clearly correct. There cannot be one measure of good faith and honest intent in one case and a different one in the other. The facts may be different, but good faith and honest intent remain the same. In paragraph 12 of the instructions the court made it clear that all facts and circumstances were to be considered by the jury in determining the question of good faith. The instruction of the court in that paragraph was as follows:

"In determining the question of the good faith of defendant in extracting and removing the ore in question, you are entitled to consider all the facts and circumstances shown by the evidence; if you find that the defendant acted under an honest belief that it was the owner of the ore in the disputed ground, and had good right and lawful authority to extract the same, and that such belief was based upon such facts and circumstances as that you believe that an ordinary man, acting as you find the defendant acted, would have had the honest belief that he owned such ore and
324 had a right to remove it, then the trespass was not willful."

In paragraph 32 of the instructions the court instructed the jury as follows:

"In considering any ore extracted from Block 8, part of which was removed under the authority of this court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed, you should make a deduction in accordance with the general rule laid down in the charge."

To this instruction the defendant excepted, for the reason that the same is contrary to law and would require the defendant to surrender its contention that such ore justly belongs to it."

It is urged, however, that the court charged the jury in effect that they should give no credit for ores held by the defendant under injunction process secured by the plaintiff itself, because it told them that defendant must have offered or left the ores in the possession of the plaintiff and proved their value, and this in face of the fact that the injunction order directed the defendant not to give them to any one, and the further fact that such surrender would have been an abandonment of defendant's claim of title, which formed

the basis of its defense in the injunction suit. It appears that
325 this question was before this Court in the case reported in 102 Fed. 436. Discussing this matter, the Court said:

"Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from 'disposing of, treating, and reducing any ores heretofore removed or extracted from said premises,' for the reason that such ores were held subject to the order of the court, and had not been converted to the use of the defendant. There is nothing in the pleadings or in the bill of exceptions to show that such ore had been returned or tendered to the defendant in error, or in any way accounted for; nor was evidence offered for the purpose of definitely fixing the value of such ore, so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if it desired to have the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to, or left in the possession of, the defendant in error, and to have submitted evidence of their value."

We think this is a sufficient answer to this objection.

We have carefully examined the Instructions as a whole and we find them clear, direct, and in conformity with the law. Where, upon the evidence before the Court, they have referred to questions admitted by the pleadings or previously determined by this Court, they have in no way prejudiced the rights of the plaintiff in error.

Finding no error in the record, the judgment of the Court below is affirmed.

(Endorsed:) Opinion. Filed Aug. 13, 1906. F. D. Monckton, clerk.

326 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In Error to the Circuit Court of the United States for the District of Montana.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the District of Montana and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed and Entered August 13, 1906. F. D. Monckton, Clerk.

327 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Judicial Circuit:

Comes now the Plaintiff in Error above named, The Montana Mining Company, Limited, and complains that in the records and proceedings had in the said cause, and in the opinion and judgment rendered therein on the 13th day of August, A. D. 1906, manifest error hath happened to the great damage of your Petitioner in this, to-wit:—

(*a.*) That in and by the opinion and judgment aforesaid, it was held that the second amended and supplemental complaint in said cause, being the complaint upon which said action was tried, did state facts sufficient to constitute a cause of action, and did not state facts showing that the plaintiff therein, the defendant in error here, had no cause of action.

(*b.*) Error was likewise committed by said Court in its opinion and judgment aforesaid in holding that the Circuit Court of the United States for the Ninth Circuit, District of Montana, did not commit error in permitting testimony to be given on the trial of said cause as to the existence of a discovery vein in the St. Louis lode mining claim, and as to the strike and dip of said vein, no allega-
328 tions whatever with reference to such vein or its dip or strike being made in the complaint, or being in the issues on the trial of said action.

(*c.*) The Court likewise erred in holding that a vein which enters and departs through the same side line of a mining claim has or can have extralateral rights under the Mineral Land Act of the United States.

(*d.*) Error was likewise committed by this Honorable Court in its opinion and judgment aforesaid, in holding that the above named defendant in error, The St. Louis Mining and Milling Company of Montana, was not estopped by its bond for a deed, the judgment rendered by the District Court of the State of Montana, within and for the county wherein the said St. Louis Lode is located in the specific performance case, and by its deed made under and by virtue of a decree in that case, from claiming any mineral whatever contained in

the thirty foot strip or compromise ground, or from claiming any other right, interest or right to the possession of said ground, or any part or portion thereof.

(*e.*) The Court erred in holding that the Circuit Court for the District of Montana, did not err in permitting the witness William Mayger to testify as to the ground which had been stoped out by the plaintiff in error northerly of the 130 plain, and to point the same out to the jury on the map (Plaintiff's Exhibit No. 1).

(*f.*) This Honorable Court also erred in holding that the Circuit Court for the District of Montana did not err in the trial of this case in refusing to permit the witnesses, John Langan, William Robinson, Warren Decamp, F. P. Sterling, John W. Eddy and Joseph K. Toole, to be called to the witness stand, and in requiring the plaintiff in error to submit to the Court in an offer of proof what it expected to establish by the testimony of each of said witnesses severally.

329 (*g.*) This Honorable Court also erred in holding that the said Circuit Court on the trial of this cause did not err in sustaining the objection made by the defendant in error to the testimony of William Robinson offered by the plaintiff in error, and that the said Circuit Court did not err in refusing to permit the plaintiff in error to call as witnesses Warren Decamp, Frank P. Sterling, John W. Eddy, John Langan and Joseph K. Toole, and to prove by them and each of them the several matters and things offered to be proven by them upon the trial of said cause.

(*h.*) This Honorable Court also erred in holding that the said Circuit Court did not commit error by refusing to permit the plaintiff in error to read in evidence to the jury the original complaint in case No. 2798, Old Series, of the records of the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis and Clarke, wherein William Robinson and others were plaintiffs, and Charles E. Mayger was the defendant, being the adverse claim suit referred to in the record of the specific performance case.

(*i.*) This Honorable Court erred in holding that the said Circuit Court did not commit error in granting plaintiff permission to amend the *ad damnum* clause in its complaint.

(*j.*) This Honorable Court erred in holding that the said Circuit Court did not commit error in overruling and denying the plaintiff in error's motion to direct a verdict in its favor on the trial of said cause.

(*k.*) This Honorable Court erred in holding in its opinion and judgment aforesaid that the Circuit Court aforesaid did not commit error in its charge to the jury, by telling them that "Defendant's answer then contains affirmative allegations which are not important in this trial, and therefore no further reference is made thereto."

330 (*l.*) This Honorable Court also erred in holding that the said Circuit Court for the District of Montana, did not commit error in giving to the jury upon the trial of this cause its instructions numbered 5, 7, 8, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 23 and 32.

(*m.*) This Honorable Court also erred in its judgment aforesaid in holding that the Circuit Court aforesaid did not commit error in refusing to instruct the jury as requested by the plaintiff in error in its instructions numbered 1, 2, 12, 16, 19, 21, 23, 28, 32 and 39.

(*n.*) Error also happened in the opinion and judgment aforesaid in that this Honorable Court refused to give full faith and credit to the judgment of the Supreme Court of the State of Montana in the specific performance case, and in that it refused to hold that the above named defendant in error was not estopped and enjoined in and by such judgment from claiming any mineral found in the said thirty foot strip or compromise ground, or from claiming any right to the possession of said ground or any part or portion thereof.

Your petitioner further shows that in this case the jurisdiction of the Circuit Court for the Ninth Circuit, District of Montana, was not dependent entirely or at all upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states, but that it was originally brought, as is shown by the complaint, pleadings and proceedings on the part of the defendant in error (plaintiff in the Court below) upon the proposition that there were questions arising in said action under the constitution and laws of the United States, in this, to-wit: whether the owner of a mining claim under the laws of the United States might
331 follow a vein beyond the side lines of his claim, the apex of which said vein entered and departed through the same side line of his claim; also the further question as to whether he might pursue said vein beyond his own side line when the same departed therefrom at an acute angle beyond a point where the whole of the said vein was within the lines of his own claim; and further whether under the laws of the United States a deed made by the owner of a mining claim for a part thereof, which contained no reservations or exceptions, but which expressly conveyed all the right, title and interest which the grantor had in the ground so conveyed, was insufficient to convey the right to pursue a vein on its dip, where he had still a part of the apex of said vein within his own claim, and also the further question of what faith or credit should be given to a judgment rendered by the highest court of a state in the courts of the United States.

Wherefore, Your Petitioner prays for an order allowing it to prosecute a writ of error from the Honorable Supreme Court of the United States to this Court, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which your petitioner shall give and furnish upon said writ of error, to operate as a supersedeas of the judgment rendered in said Circuit Court, and that upon the giving of such security that all further proceedings in this Court be suspended and stayed until the final determination of the said writ of error by the Honorable Supreme Court of the United States, and your petitioner as in duty bound will ever pray.

CHARLES J. HUGHES, JR.,
W. E. CULLEN,
Attorneys for Petitioner.

332 Let the writ of error prayed for in the foregoing petition issue, and further proceedings in this cause in this Court be stayed, upon the petitioner executing a good and sufficient bond in the sum of two hundred and fifteen thousand Dollars, conditioned as required by law.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) Petition for Writ of Error and Order that Writ issue etc. Filed Aug. 22, 1906. F. D. Monckton, Clerk.

333 In the Supreme Court of the United States.

THE MONTANA MINING COMPANY, LTD., Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Defendant in Error.

Comes now the above named Plaintiff in Error by Charles J. Hughes, Jr., and W. E. Cullen, its Attorneys, and assigns the following as errors upon which it will rely in the Supreme Court of the United States for the reversal of the opinion and judgment rendered and entered in *in* the above entitled action by the Court of Appeals for the Ninth Judicial Circuit on the 13th day of August, 1906, and for the reversal of the judgment of the Court below:

I.

The Honorable, the Court of Appeals for the Ninth Circuit, erred in holding that it was bound by the opinions rendered by it and reported in the one hundred and second Federal Reporter, Page 430, and the 104 Federal Reporter, 664, for that judgments which were rendered in pursuance of said opinions and which gave binding force to the same, were vacated and set aside by the judgment of the said Court rendered October 8th, 1902.

II.

That there was error in said opinion and judgment so rendered as aforesaid, in that it was held upon the strength of the two former opinions in this cause; that the second amended and supplemental complaint being the complaint upon which this action was tried,
334 did state facts sufficient to constitute a cause of action and did not state facts showing that the Plaintiff therein (the Defendant in Error here) had no cause of action.

III.

Error was likewise committed by said Court of Appeals in its opinion and judgment aforesaid, in holding that the Circuit Court of the United States for the Ninth Circuit District of Montana did not commit error in permitting testimony to be given on the trial of

said cause as to the existence of a discovery vein in the St. Louis Lode Mining Claim and as to the strike and dip of said vein no allegations with reference to such vein or its dip or strike being made in the complaint or in any wise being in issue in said action.

That the said Circuit Court of Appeals erred in holding that the Circuit Court aforesaid did not commit error

(*a*) In permitting the witness, William Mayger, to testify in answer to the following question:

Q. "Which direction does it run?"

To which question the Plaintiff in error objected on the ground that the same was irrelevant and immaterial for that the direction or strike of the discovery vein was not in issue, there being no allegation in the complaint relative to the strike or dip thereof.

(*b*) The Court of Appeals also erred in holding that the said Circuit Court did not err in permitting the said witness to testify that the St. Louis discovery vein ran very nearly parallel with the side lines of the St. Louis as staked; that it dipped to the East; that they had traced it to within 95 feet of the end line at the South end and within 400 feet of the North end.

(*c*) In holding that there was no error in permitting the witness, Walter Proctor Jenny, to testify, as follows:

"I have examined the discovery vein of the St. Louis Lode Mining Claim. Its course is substantially Northeast and Southwest. Explorations under ground shows that it lies within 750 feet
335 of the North end line and in the South end it is traced within 95 feet of the end line. The dip of the vein is from vertical to a dip of 85° to 90° Easterly."

The Plaintiff in Error having objected to said testimony and to the question eliciting the same for that the strike and dip of said discovery vein was not in issue.

(*d*) Error was likewise committed in permitting the witness, John R. Parks, to testify, as follows, to-wit:

"The discovery vein of the St. Louis is a gold bearing fissure vein running in the general direction of the side lines, the vein is developed both northerly and southerly from the Transcontinental Tunnel."

The said testimony and the questions in answer to which the same was given having been objected to by the Plaintiff in Error for the reasons aforesaid.

(*e*) The Court of Appeals also erred in holding that the Circuit Court did not err in permitting all of the other testimony shown in the Record relative to the discovery vein of Plaintiff's St. Louis Mining Claim, and its strike and dip, and permitting the same to be received in evidence over the objections of the Plaintiff in Error thereto.

IV.

The Court of Appeals likewise erred in holding in and by its decisions aforesaid that a mineral bearing vein the apex of which enters and departs through the same side line of a mining claim has, or can have extra-lateral rights under the Mining Laws of the United States.

V.

The Honorable, the Court of Appeals, likewise erred in holding by its judgments and opinions aforesaid, that the St. Louis Mining and Milling Company of Montana, was not estop-ed by the bond for a deed given by its predecessor in interest, the judgment rendered against it by the District Court of the State of Montana with-
336 in and for the County of Lewis & Clarke, wherein the said St. Louis Lode is located, in the specific performance case and by its deed made under and in pursuance of the Decree rendered in that case from claiming any right to mineral contained in the thirty foot strip or compromise ground, and this without reference to whether the Lode in which such mineral was found had its apex within or without the said thirty foot strip or compromise ground; and it further erred in holding that the said Defendant in Error was not expressly enjoined and restrained from claiming any right, title or interest in or to such mineral or any part or portion thereof.

VI.

The Honorable, the Court of Appeals, aforesaid, also erred in holding in and by its opinions and judgments aforesaid that the said Defendant in Error was entitled to pursue the Drumlummon vein on its dip downward between its so called 108 and 133 foot planes; and it erred in holding that the Circuit Court for the District of Montana did not err in permitting the witness, William Mayger, to testify as to the ground which had been stoped out by the Plaintiff in Error northerly of its so called 133 foot plane and to point out to the Jury on Plaintiff's Exhibit No. 1 where he claimed such stoping to have been done.

(*a*) Error was committed by said Court of Appeals by holding that said Circuit Court did not err in permitting the said witness to answer the following question, to-wit:

Q. "Point out to the Jury, westerly of the 133 foot plane, where the stopes have been taken out?"

(*b*) And in permitting the said Mayger over the objections of the Plaintiff in Error to testify as follows, to-wit:

"The entire vein is stoped out between the 108 and the 133 foot plane from the surface to the 190 foot level of the Montana Company's works.

(*c*) In permitting the Witness Parks to testify over objection, as follows:

"I have block No. 1 the stope South of the North line
337 of the Montana Company's apex shaft to the 133 foot plane and from the surface to the instrument at "K." It lies entirely within the boundaries of the compromise ground extended downward vertically. The block has an average width of 7 feet, is 21 feet long and 36.3 feet high." Also in holding that it was not error to receive the testimony of witnesses as shown by the Record with reference to Blocks 2, 3, 5, 6 and 7, all of which, as is shown by the testimony, lie wholly within the compromise ground and between Plaintiff's so called 108 and 133 foot planes; for that all

of said testimony was objected to by Plaintiff in Error and was inadmissible for the reason that the Defendant in Error did not have the whole of the apex of the Drumlummon vein within the surface boundaries of its Claim beyond its so called 108 foot plane, and that permitting it to pursue the vein between the two planes was a taking of the vein on its strike and was an unlawful interference with and an appropriation of 168 square feet of the surface of the compromise ground, property of the Plaintiff in Error.

VII.

The Court of Appeals erred in holding that the Circuit Court aforesaid, did not err in sustaining objection to the following question asked of the witness, John H. Farmer, by Plaintiff in Error, to-wit:

Q. Draw a line at right angles to that one (indicating the East line of the compromise ground) 50 feet from the center of the discovery shaft on the Nine Hour, where would it bring it on the map, that is, from the center of the discovery shaft on the Nine Hour and at right angles to the line between corners 2, and 3 of the St. Louis?

Said witness having testified that he was a Mining Engineer and had made the map (Defendant's Exhibit "E") about which he was testifying.

VIII.

The Court of Appeals erred in its holding that the Circuit Court did not err in refusing to permit the witnesses, John Langan,
338 William Robinson, Warren De Camp, F. P. Sterling, J. W. Eddy, and Joseph K. Toole, witnesses for Plaintiff in Error, to be called to the stand, and in requiring the Defendant to submit to the Court in an offer of proof what it expected to establish by the testimony of each of said witnesses, severally.

IX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit the Defendant to call to the witness stand John H. Farmer and to prove by him that he had read the complaint in the Adverse Claim Suit, brought by the Owners of the Nine Hour against the St. Louis Claim, which complaint is referred to in the complaint in the Specific Performance case; that he knew the description therein contained and that it represented an area of 1.98 acres. That he had platted the area in conflict on the map (Defendant's Exhibit "E") and that it included the 30-foot strip or the Compromise ground.

X.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objection made by plaintiff (Defendant in Error here) and in refusing to permit the defendant (Plaintiff in Error here) to prove by the witness William Robinson, present in Court, that he was the person who located the Nine Hour Claim

and the representative of his co-owner when the settlement of the Adverse Suit was made. That the whole area in conflict in that suit was 1.98 acres, the boundaries of which were accurately shown upon the map (Defendant's Exhibit "E"); and that all of the strip described in the bond was the easterly 30 feet of said 1.98 acres. That the instructions he received with reference to the settlement of said Adverse Claim suit from his co-owner De Camp, was that he was to retain the right to the ore beneath the Compromise ground without regard to where the apex of the lode was, in which said ore might be contained. That it was arranged with William Mayger representing Charles Mayger, that the Nine Hour claimants
339 were to have the 30-foot strip and, "All of the mineral therein contained" without regard to where the apex of the lode might be in which such mineral was contained. That this was the distinct understanding of the parties before the bond (Defendant's Exhibit "A") attached to its answer was drawn up. That said bond was drawn up by Messrs. Toole & Toole, who were the attorneys for William Mayger. That the witness, after said bond was drawn up, went to Joseph K. Toole with said bond and inquired of him whether the obligor in said bond could pay the penal sum named therein and avoid making conveyance of the said premises, and whether by its terms the bond gave to witness and his co-owners all of the mineral contained in said Compromise ground regardless of where the lead in which it was found might have its apex. That he knew where the east side line of the St. Louis Lode Mining Claim was prior to the time that he staked his Nine Hour Claim, and that the westerly line of the Nine Hour Claim was not within 25 feet on the south end and 50 feet on the north end of said St. Louis east side line. That after his discovery, the southeast corner stake of the St. Louis was moved up to a point near the east side line of his Nine Hour Claim, which point is correctly shown on defendant's map (Exhibit "E"). That when the St. Louis was surveyed for patent, such survey was started from its northeast corner stake and ran in the direction of the stake which had been moved to the point marked corner No. 2 on its survey, where a monument was put up, where no stake or monument had ever stood before, from which point the said side line had an angle to its corner No. 3. That the extension of said east side line of said St. Louis Claim over witness' Nine Hour Claim was wrongful and resulted in securing as a part of said St. Louis Mining Claim all of the area of said Nine Hour Claim embraced within said line, save and except the 30-foot strip.

XI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit the defendant to call (Plain-
340 tiff in Error here) Warren De Camp and to establish by him that he was a co-owner in the Nine Hour Claim, at the time that the Adverse Claim suit was pending; that he knew the settlement that was made and that he would not have consented thereto, but for the fact that the owners of the Nine Hour were to have the 30-foot strip, together with all of its mineral contents regardless of

where the apex of the lode in which such mineral so found, might be. That he knew of the wrongful extension of the east side line of the St. Louis over the Nine Hour, made at the time of the survey for patent of said claim. That he knew where the east line of the St. Louis was as originally staked, and the west line of the Nine Hour as that claim was staked, and that there was an interval of unclaimed territory between the two lines.

XII.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining plaintiff's objection to calling Frank P. Sterling, then in court, to the witness-stand and in refusing to permit the said defendant (Plaintiff in Error here), to prove by said Sterling that at the time Defendant's Exhibit "A" attached to defendant's answer herein was drawn, he was a lawyer, was interested in said Nine Hour Claim as a co-owner, that he understood the law of apex rights, that it was distinctly understood and agreed between the owners of the Nine Hour and of the owners of the St. Louis at the time said bond was made, that the owners of the Nine Hour should own all of the mineral contained in said 30-foot strip or Compromise ground, and that the owners or owners of the St. Louis, should not have the right to follow into such ground any lead, lode, ledge or vein having its apex within the surface boundaries of the St. Louis Claim. That the witness, William Robinson, after said bond had been drawn up, took it to Governor Joseph K. Toole to learn whether it relcived the ground known as the Compromise ground from the apex rights of the St. Louis Claim adjoining it. And that he, said Robinson, would not accept said bond until he had been so assured of said fact.

341 XIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objection made by the plaintiff to defendant's offer to prove by the witness John W. Eddy, that he was a co-owner in the Nine Hour Claim at the time of the settlement of the Adverse suit. That it was the distinct understanding between all of the parties to that settlement, that the Compromise ground was to be a piece of ground whose westerly line should be parallel to the lines of the St. Louis between corners numbered 2 and 3 and 50 feet distant from the center of the Nine Hour Discovery shaft. That no settlement or agreement would have been entered into by the obligees named in the said bond; but for the fact that the said obligees were to have all of the mineral contained in said ground without regard to where the apex of the vein might be in which such minerals were found.

XIV.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objections made by the plaintiff to the calling of John Langan, then in court, to the witness-stand, and in

sustaining its objection made to the offer of defendant to prove by said witness that he knew where the east line of the St. Louis Claim was originally located, and where the west line of the Nine Hour was located, and that he knew that there was a vacant space of unclaimed ground between the two lines. That he knew that the easterly line of the St. Louis was wrongfully extended over the Nine Hour.

XV.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing upon objection of plaintiff to permit the defendant to call Joseph K. Toole and in rejecting its offer to prove by said witness that the bond for a deed (Defendant's Exhibit "A") attached to its answer, was in his handwriting; that the words "Together with all the mineral therein contained," were inserted therein because that was the agreement of the parties at the
342 time said bond was drawn.

XVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit defendant to read in evidence the original complaint, and the replication in case No. 2798, Old Series, of the records of the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis & Clarke, wherein William Robinson, *et al.*, were plaintiffs and Charles F. Mayger was defendant, being the adverse Claim Suit referred to in the record in the Specific Performance Case, for the purpose of showing that the area involved was the 1.98 acres testified to as shown upon Defendant's Exhibit "E."

XVII.

The Court of Appeals erred in holding that the said Circuit Court did not err in overruling and denying defendant's motion to direct a verdict in its favor.

XVIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in telling them in the preliminary portion thereof that, "defendant's answer then contains affirmative allegations which are not important in this trial and therefore no further reference is made thereto."

XIX.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge in giving to the jury its instructions numbered 5, which said instructions is as follows, to-wit: "The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of

law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and the 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then
343 the defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

XX.

The Court of Appeals erred in holding that the said Circuit Court did not err in charging the jury as in its instruction No. 8, which said instruction is as follows, to-wit:

"If you find that the course of strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or elsewhere is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location. And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extralateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis Claim, between the 520 and the 133-foot planes, that the discovery vein of the St. Louis Claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis Claim between said planes generally lengthwise of the claim."

XXI.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving its instruction No. 17, which is as follows, to-wit:

"If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use quartz, rock and ore, within the planes belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of the said trespass cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespassers may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the
344 evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injury it has sustained."

XXII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in its instruction No. 18, which said instruction is as follows, to-wit:

"The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the moneys expended in the running of levels, sinking of shafts or development work, except, to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the Mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant, or any salaries paid to its officers, or any wages to any person, except to those actually employed and engaged in the extraction, transportation and milling of the ores in question."

XXIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving its instruction No. 19, which is as follows, to-wit:

"When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it
345 was a trespass upon said claim within its surface boundaries.

And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis Claim and the ore extracted therefrom."

XXIV.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury giving to said jury its 20th instruction, which is as follows, to-wit:

"If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and the 133-foot planes, and the value thereof, and that it did not do so, but took away from the plaintiff the means of proving the true and correct amount and value thereof, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by the misconduct of defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find from the facts as above indicated, you are at liberty to follow the evidence given in behalf of plaintiff, as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence."

XXV.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving to said jury its 21st instruction, which is as follows, to-wit:

"As to the evidence disclosed by the books of the defendant and the abstract thereof, offered in evidence in behalf of defendant, I charge you that to entitle them to be considered as sufficient evidence to prove the value of the ore extracted from the Drumlummon vein, you must be satisfied that the ores taken from other parts of
346 defendant's mine, which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition."

XXVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in giving to the jury its 23rd instruction, which is as follows, to-wit:

"The law is well settled that if one wilfully places the property of another in a situation where it cannot be recovered, or its true amount of value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value *of* which the property in question can be reasonably estimated."

XXVII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury by giving to the jury its instruction No. 32, which is as follows, to-wit: "In considering any ore extracted from Block 8, part of which was removed under the authority of this Court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefore; on the other hand, if such facts are so disclosed you should make a deduction in accordance with the general rules laid down in the charge."

XXVIII.

The Court of Appeals erred in holding that the said Cir-
347 cuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. 1.

"The defendant having heretofore and on or about the 1st day of June, A. D. 1895, recovered a judgment and decree against the

above-named plaintiff in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, being the judgment and decree mentioned and set forth in the answer herein and in the evidence before you. And it not appearing from the testimony herein, that said judgment, in so far as it awards all of the mineral contained in the Compromise ground to the defendant herein, has been, or was at any time modified, reversed or so restricted in its meaning as to apply only to such mineral as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said Compromise ground, and, it appearing further, that in and by said judgment and decree, the plaintiff herein was forever barred from all interest or claim to said Compromise ground, or to any part or portion thereof or to the possession thereof, or of the mineral or any thereof. You are instructed that such judgment and decree absolutely concludes the plaintiff as to any and all mineral contained in said Compromise ground, whether the leads, lodes or veins wherein such mineral is found, have, or have not their apices within the surface boundaries of the plaintiff's St. Louis Claim or otherwise, and as for all alleged trespasses in said Compromise ground, you will not take the same into your consideration or return any verdict therefor.

The Court instructs you that in order to entitle a miner to follow a vein or lode, having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of such top or apex within his surface boundaries. In this case, the plaintiff alleges that between what it denominates its 108 and 133-foot planes, it has only a part of the top or apex of the Drumlummon Lode within its surface boundaries. The Court therefore instructs you that as between these two planes, the plaintiff would not have the right to follow this vein on its dip, and you will disregard all
348 testimony relating to ores mined on the dip of the vein between these two planes mentioned and demonstrated the 108 and 133-foot planes."

XXIX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. II, which said instruction is as follows, to-wit:

"It appearing that in and by the bond for a deed, a copy whereof is annexed to the defendant's answer herein, and by the judgment rendered on or about June 1st, 1895, in the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke, in an action wherein the predecessor in interest of the defendant herein was plaintiff and the plaintiff herein was defendant, the plaintiff herein was precluded from asserting any right, title or interest in and to the Compromise ground, or to any and all mineral therein contained, the said plaintiff had neither the actual nor constructive possessioon of the ground in which the trespasses complained of are alleged to have been committed and is,

therefore not entitled to recover in this action. You are therefore instructed to return a verdict for the defendant."

XXX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XII, which said instruction is as follows, to-wit:

"It is alleged in the answer in this case that a judgment was duly rendered and given on or about the 1st day of June, A. D. 1895, in an action then pending in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis & Clarke, wherein the predecessor in interest of the defendant in this action was plaintiff and the plaintiff herein was de-
349 fendant. Whereby, it is claimed, that all of the mineral contained in the thirty-foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of the plaintiff by its replication filed in this action, that such judgment was rendered, but, it is alleged that it was confined to such mineral and such mineral only, as was or is found in leads or lodes having their tops or apices wholly within the surface boundaries of the said Compromise strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the Compromise ground was distinctly in issue in that case, as appears by the pleadings, which are in likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of the plaintiff's right to recover, for any and all ores which you may find that the defendant has mined within the surface boundaries of the Compromise ground extended downward vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff."

XXXI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XVI, which said instruction is as follows, to-wit:

"The section of the Mineral Land Act which grants to the owner of a mining claim the right of extralateral pursuit of a vein having its top or apex within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course, beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis Claim, introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extralateral right on the
350 Drumlummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim

of the defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extralateral right, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drumlummon vein, and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

XXXII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XIX, which said instruction is as follows, to-wit:

"The burden of proof in this case is on the plaintiff, and unless you find from a preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, then your verdict should be for the defendant."

XXXIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXI, which said instruction is as follows, to-wit:

"As I have already explained to you, plaintiff's extralateral rights on the Drumlummon vein, where the same is found within surface boundaries of its St. Louis Claim, is limited and controlled by the extralateral rights which you may find from the testimony it has, or would be entitled to on its discovery vein, should taht vein in its course, downward on its dip extend to and under the surface boundaries of the Nine Hour Claim. The law does not contemplate that the owner of a mining claim shall have a greater length of vein beneath the surface that he has length of apex of the vein on the surface.

351 For illustration, suppose that the plaintiff in the case, had only one hundred feet of the apex of its St. Louis Claim within the surface boundaries of its claim, and that it was so situated, with reference to the Nine Hour Claim, that on its dip downward and under the surface of that claim it would have extralateral rights; then it would only be entitled to one hundred feet in length along the course or strike of the vein in the Nine Hour Claim.

Applying these principles to the case at bar, the Court instructs you that if you should find from a preponderance of the testimony that the vein in the sixty five foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis Claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental tunnel or fissure, then plaintiff's extralateral rights on the Drumlummon vein are controlled by the length of the discovery vein of the St. Louis Claim and are practically coterminous therewith. To illustrate what I mean, suppose you should find that at the northerly end of the discovery vein of the St. Louis, it termi-

nates practically at the end of the northeasterly drift driven by plaintiff from the bottom of its sixty-five-foot shaft, then you would be authorized to draw an imaginary line from said point to the Drumlummon vein, at right angles to the general course or strike of said Drumlummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extralateral rights, on the Drumlummon vein.

Then should you further find, from a preponderance of the testimony that plaintiff's discovery vein on its westerly course practically terminates at the Transcontinental tunnel or fissure, then a line drawn at right angles to the general course of the Drumlummon vein to such westerly point of termination of the St. Louis discovery vein, will mark the termination of plaintiff's extralateral rights in said Drumlummon vein, no matter how much further to the southward the whole, or a part of the apex of the Drumlummon vein may be found within the St. Louis Claim."

352 XXXIII.

The Court of Appeals erred in holdin- that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXIII, which said instruction is as follows, to-wit:—

"If you should find from the testimony that the vein in the sixty-five-foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental tunnel, and that the vein found in the sixty-five-foot shaft passes through the fissure shown in the Transcontinental tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence, that such vein continues on its course through its St. Louis Claim, and passes out of the south end line of its claim, or practically does so. If you should find from the evidence that the fissure shown in the south side of the Transcontinental tunnel at a point a little westerly of the point where the vein from the sixty-five-foot shaft intersects said tunnel is the same fissure as that in which the vein in the sity-five-foot drift is found, but that it only extends into the wall of the tunnel for a few feet and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental tunnel as practically the southerly end of the plaintiff's said discovery vein, and your verdict should be for the defendant."

XXXIV.

The Court of Appeals erred in holding that said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXVI. which said instruction is as follows, to-wit:—

"The Court instructs you that your first duty is to examine and ascertain what, if any extralateral rights attach to the dis-
353 covery vein of the plaintiff's St. Louis Claim. In the first place you must ascertain which of the surface lines, are, in

law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them on the ground, or named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practically parallel to the course of the discovery vein as it passes through the claim. For example, if you should find from the evidence that the discovery vein of the St. Louis Claim was in what has been denominated the 65-foot shaft, and that the vein therein discovered, on its course or strike through the claim, would pass out of the surface boundaries of the St. Louis, between corners numbered one and two thereof, and that following said course in a southwesterly direction, it would pass out of the westerly boundary of the said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this case would terminate, when you had found that fact. This is so, because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which he first discovered and upon which he made his location, was substantially parallel to the easterly boundary line of his claim, before you would be justified in awarding him extralateral rights on the Drumlummon vein, or on so much of it as has its apex inside of the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis ground through the easterly boundary thereof, then, in whatever direction it might dip, it would not have extralateral rights within or under the Nine Hour Claim, and extralateral rights could not be claimed for the Drumlummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled
354 to all the Drumlummon lode found within the surface boundaries, but they could not pursue on its dip an inch beyond the easterly line of the St. Louis Claim, extended downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him extralateral rights under the Nine Hour Claim, it is plaintiff's misfortune, and one which neither this Court nor this jury can correct. Mr. Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made. He should have staked his claim along the strike of the vein, and not across it."

XXXV.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXVIII which said instruction is as follows, to-wit:

"It conclusively appears by the testimony in this case, and it is an undisputed fact that the Compromise ground or the 30-foot strip as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode Mining Claim. The Court there-

fore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis Claim was first located and first patented. Having been patented as a part of the St. Louis, the Compromise ground is to be regarded as standing exactly on the same plane, so far as priority is concerned, with every part of the St. Louis Claim."

355 XXXVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as reuqested by the defendant in its instruction No. XXXII, which said instruction is as follows, to-wit:

"Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterward deeded to the defendant company or its predecessor, I instruct you that the extra-lateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis Claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour, does not involve any admission on the part of the defendant that the portion of the St. Louis Claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis company to follow the vein to depth in this action must be limited by what is called the 108-foot plane, or the departure point of the hanging-wall and that there can be no recovery in this case for any ores extracted South of the 108-foot plane."

XXXVII.

The Court of Appeals erred in holding that the verdict in said case in the Circuit Court was not grossly excessive and apparently the result of passion or prejudice and that the judgment rendered thereon and said verdict were not excessive and were supported by the evidence given in said cause on the trial thereof; the said verdict and judgment being grossly excessive and unsupported by the testimony in said cause and contrary thereto.

356 Wherefor- the above named plaintiff in error the said The Montana Mining Company Limited, prays that the judgment of the Circuit Court of the United States, for the district of Montana, and the judgment of the Court of Appeals for the Ninth Circuit be reversed and set aside and that by the proper order of this Court the said Circuit Court and the said Court of Appeals be directed to enter an order setting aside the verdict and judgment aforesaid and dis-

missing the said action with costs and that the plaintiff in error have such other and further relief as it may be entitled to.

CHARLES J. HUGHES, JR.,
W. E. CULLEN,
Att'y. for Plaintiff in Error.

(Endorsed:) Assignment of Errors. Filed Aug. 22, 1906. F. D. Monckton, Clerk.

357 In the Supreme Court of the United States.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Defendant in Error.

Know all men by these presents, That we, the Montana Mining Company, Limited, a Corporation organized under the laws of Great Britain, and doing and entitled to do business in the State of Montana, as principal, and the Union Bank & Trust Company, a corporation, organized under the laws of the State of Montana, and qualified to be a surety on judicial bonds in the Courts of the United States, as surety, are held and firmly bound unto the Saint Louis Mining & Milling Company of Montana in the full and just sum of Two Hundred Fifteen Thousand Dollars ($215,000.00), to be paid to the said Saint Louis Mining & Milling Company of Montana, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 18th day of August, A. D. 1906.

Whereas, lately at a term of the Circuit Court of Appeals for the Ninth Circuit, in a suit depending in said Court, between the Montana Mining Company, Limited, plaintiff in error, and the St. Louis Mining & Milling Company of Montana, defendant in error, a judgment was rendered on the 13th day of August, 1906, against the said, the Montana Mining Company, Limited, affirming a judgment for the sum of one hundred and ninety five thousand
358 dollars ($195,000), and nine hundred and twenty-six & 80/100 dollars ($926.80) costs of suit, rendered against it in the United States Circuit Court for the District of Montana, and the said the Montana Mining Company, Limited, having obtained from the chief judge of said Circuit Court of Appeals, a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said the St. Louis Mining & Milling Company of Montana, citing and admonishing it to be and appear at a United States Supreme Court to be held at the City of Washington, in the District of Columbia, within thirty days from the date thereof,

Now, therefore, the conditions of this obligation is such that if the above named the Montana Mining Company, Limited, shall prosecute its said writ of error to effect, and answer all damages and costs

if it fail to make its plea good, then the above obligation to be void, otherwise the same shall remain in full force and virtue.

MONTANA MINING COMPANY, LIMITED,
[SEAL.] By ALEXANDER BURRELL,
Manager and Attorney in Fact.
UNION BANK AND TRUST COMPANY,
By GEORGE L. RAMSEY, *President.*

[SEAL.] Attest: R. O. KAUFMAN, *Secretary.*

Sealed and delivered in presence of:
F. W. HALL.
H. E. BRAN.

359 P. N. Lilienthal, Manager of the Anglo-Californian Bank, Limited, of San Francisco, California, is our duly appointed agent in an- for the Northern District of California, upon whom all lawful process in any action or proceeding against the company may be served.

360 Whereas, the Union Bank and Trust Company, a corporation, duly incorporated under Sec. 604, as amended, of the Civil Code of the State of Montana, has deposited with the Attorney-General its articles of incorporation and the statement required by Section 3 of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as sole surety on recognizances, stipulations, bonds, and undertakings permitted or required by the laws of the United States to be given with one surety or with two or more sureties, and has satisfied me that it has authority under its charter to do the business provided for in the Act last mentioned; that it has paid up capital of not less than $250,000 in cash or its equivalent; and that it is able to keep and perform its contracts:

Now, therefore, the said Union Bank and Trust Company is hereby granted authority to do business under said Act in the State of Montana, and also beyond the limits of said State in any judicial district of the United States in which it shall first have appointed an agent conformably to the provisions of Section 2 of said Act.

[SEAL.] M. D. PURDY,
Acting Attorney-General.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *July* 24, 1905.

The above is a true copy of an original authorization to do business, issued by the Attorney General under the Act of Congress approved August 13, 1894.

Witness my hand and the seal of the Department.

[SEAL.] M. C. MASTERSON,
Acting Chief Clerk.

361 STATE OF CALIFORNIA, *City and County of San Francisco*, ss:

Jesse W. Lilienthal, being first duly sworn, says: I am the brother of P. N. Lilienthal, Manager of The Anglo-Californian Bank, Limited, of San Francisco, California, whose residence is in said City and County.

The said P. N. Lilienthal has been appointed and is now Agent of the Union Bank and Trust Company, a corporation, organized under the laws of the State of Montana, and qualified to become a surety on judicial bonds in the Courts of the United States, and is authorized by said Union Bank and Trust Company to receive service of process for and on its behalf.

JESSE W. LILIENTHAL.

Subscribed and sworn to before me this 22nd day of August, A. D. 1906.

[SEAL.] EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

Form of bond and sufficiency of surety approved this 22nd day of August, A. D. 1906.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) Supersedeas Bond on Writ of Error to Supreme Court. Filed Aug. 22, 1906. F. D. Monckton, Clerk.

362 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, etc.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-seven (77) pages, numbered from one (1) to seventy-seven (77), inclusive, to be a true copy of the assignment of errors and of all proceedings had in the above entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed therein, as the same remain of record in my office, and that the same in connection with the preceding certified copy of the Printed Transcript of Record constitute a true copy of the record, and in connection with the accompanying original exhibits, viz: Plaintiff's Exhibits: 1, 4, 9, Complainant's Exhibit: 3,

and Defendant's Exhibits: C, D, E, F, G, H, I, L, and M, constitute the transcript of record upon return to the annexed writ of error.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 17th day of September, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

363 UNITED STATES OF AMERICA, *ss:*

To the St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error duly issued out of the clerk's office of the United States circuit court of appeals for the Ninth Circuit, wherein the Montana Mining Company, Limited, is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness William W. Morrow, U. S. circuit judge & judge of the United States circuit court of appeals for the ninth circuit, this 22nd day of August, in the year of our Lord, one thousand nine hundred and six.

WM. W. MORROW,
Circuit Judge.

364 [Endorsed:] Docketed No. 1240 United States Circuit Court of Appeals for the Ninth Circuit The Montana Mining Company, Limited *vs.* The St. Louis Mining and Milling Company of Montana. Citation on Writ of Error. Filed August 31, 1906. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Received a copy of the within citation this — day of August, 1906.

ARTHUR BROWN,
BACH & WIGHT,
M. S. GUNN, &
J. B. CLAYBERG,
Att'ys for Def't in Error.

365 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greetings:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, between The Montana Mining Company, Limited, plaintiff in error *vs.* The St. Louis Mining and Milling Company of Montana defendant in error, manifest error hath happened, to the great damage of the said The Montana Mining Company, Limited, plaintiff in error, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 22nd day of August, in the year of our Lord, one thousand nine hundred and six.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by
WM. W. MORROW,
Circuit Judge.

366 [Endorsed:] Docketed. No. 1240. United States Circuit Court of Appeals for the Ninth Circuit. The Montana Mining Company, Limited, *vs.* The St. Louis Mining and Milling Company of Montana. Writ of Error. Filed August 31, 1906. F. D. Monckton, Clerk U. S. Circuit Court for the Ninth Circuit.

Received a copy of the within writ of error this — day of August 1906.

ARTHUR BROWN,
BACH & WIGHT,
M. S. GUNN, &
J. B. CLAYBERG,
Att'ys for Def't in Error.

Return to Writ of Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

Endorsed on cover: File No. 20,367. U. S. circuit court of appeals, ninth circuit. Term No. 402. The Montana Mining Company, Limited, plaintiff in error, *vs.* The St. Louis Mining and Milling Company of Montana. Filed September 22, 1906. File No. 20,367.